Supreme Court, U.S.
FILED

01126 MAY 22 2002

OFFICE OF THE CLERK

No. _____

In The Supreme Court of the United States

MIGNON MOORE,

Petitioner,

v.

TRAVIS PRUITT & ASSOCIATES, P.C.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

KRISTINE E. ORR
E. WYCLIFFE ORR
ORR & ORR
P.O. Box 2944
641 Spring St.
Gainesville, GA 30503
(770) 534-1980

ERIC SCHNAPPER*
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

60 pgs

QUESTIONS PRESENTED

1. Title VII of the 1964 Civil Rights Act prohibits discriminatory harassment which creates a hostile work environment. Where the defendant in a hostile environment case moves for summary judgment, should the court

(a) make a judicial determination of whether the harassment in fact created a hostile environment, or

(b) inquire only whether a reasonable trier of fact (usually a jury) could conclude that there was such a hostile environment?

2. Section 704(a) of Title VII prohibits an employer from discriminating against any employee "because he has opposed any practice made an unlawful practice by this Title." Did the court of appeals err in holding that Title VII protects only opposition which takes the form of "a report of" asserted unlawful discrimination, but not resistance to a harasser himself?

PARTIES

The parties to this proceeding are set forth in the caption.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Statutes and Constitutional Provision Involved	2
Statement of the Case	2
Reasons for Granting The Writ	7
I. This Case Presents An Important Issue Regarding The Respective Roles of Juries and Judges In Resolving Sexual Harassment Claims	7
II. This Case Presents An Important Inter-Circuit Conflict Regarding Whether Employees Are Protected By Title VII If They Resist Harassment or Other Unlawful Discrimination	18
Conclusion	26
Appendix	
Opinion of the Court of Appeals (August 10, 2001)	1a
Final Report and Recommendation of Magistrate Judge (August 3, 2000)	11a
Order of the District Court (November 13, 2000)	36a

TABLE OF CONTENTS – Continued

Page

Judgment of the District Court (November 15, 2000)..... 37a

Order of the Court of Appeals Denying Rehearing (February 21, 2002)..... 39a

TABLE OF AUTHORITIES

Page

CASES:

Abramson v. William Patterson College of New Jersey, 260 F. 3d 265 (3d Cir. 2001) 14

Aman v. Cort Furniture Rental Corp., 85 F. 3d 1074 (3d Cir. 1996) 15, 23

Armbruster v. Epstein, 1996 WL 289991 (E.D.Pa. 1996) 25

Bampoe v. Coach Stores, Inc., 93 F. Supp. 2d 360 (S.D.N.Y. 2000) 20

Black v. City & County of Honolulu, 112 F. Supp. 2d 1041 (D.Hawai'i 2000) 25

Boyd v. James S. Hayes Living Health Care Agency, Inc., 671 F. Supp. 1155 (W.D.Tenn. 1987) 25

Bradley v. Widnall, 232 F. 3d 626 (8th Cir. 2000) 13

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) 23, 24

Clearwater v. Independent School District No. 166, 231 F. 3d 1122 (8th Cir. 2000) 13

Cook v. Henderson, 2002 WL 252535 15

Cruz v. Coach Stores, Inc., 202 F. 3d 560 (2d Cir. 2000) 19, 20, 23, 24

DeGrace v. Rumsfeld, 614 F. 2d 796 (1st Cir. 1980) 22

Del Castillo v. Pathmark Stores, Inc., 941 F. Supp. 437 (S.D.N.Y. 1996) 20

Drake v. Minnesota Min. & Mfg. Co., 134 F. 3d 878 (7th Cir. 1998) 23

EEOC v. Domino's Pizza, Inc., 909 F. Supp. 1529 (M.D.Fla. 1995) 25

TABLE OF AUTHORITIES – Continued

Page

EEOC v. HBE Corp., 135 F. 3d 543 (8th Cir. 1998) 23

EEOC v. R & R Ventures, 244 F. 3d 334 (4th Cir. 2001) 11

Elkins v. Pharmacy Corp. of America, 2000 WL 962669 11

Excel Corp. v. Bosley, 165 F. 3d 635 (8th Cir. 1999) 21

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 23, 24

Fitzgerald v. Henderson, 251 F. 3d 345 (2d Cir. 2001) 14

Fitzgerald v. Henderson, 36 F. Supp. 2d 490 (N.D.N.Y. 1999) 20

Fleming v. South Carolina Dept. of Corrections, 952 F. Supp. 283 (D.S.C. 1996) 25

Fuller v. City of Oakland, California, 47 F. 3d 1522 (9th Cir. 1995) 10

Gallagher v. Delaney, 139 F. 2d 338 (2d Cir. 1998) 13

Green v. Caldera, 2001 WL 1098095 11

Gurganus v. Beneficial North Carolina, Inc., 2001 WL 1627655 11

Gwen v. Regional Transit Authority, 2001 WL 345793 12

Harper v. Blockbuster Entertainment Corp., 139 F. 3d 1385 (11th Cir. 1998) 19

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) ... 16, 17

Hibbler v. Regional Medical Center at Memphis, 2001 WL 700829 (6th Cir.) 12

TABLE OF AUTHORITIES – Continued

Page

Hocevar v. Purdue Frederick Co., 223 F. 3d 721 (8th Cir. 2000) 13

Hopkins v. Baltimore Gas and Electric Co., 77 F. 3d 745 (4th Cir. 1996) 12

Howley v. Town of Stratford, 217 F. 2d 141 (2d Cir. 2000) 14

Hudson v. C.P. Rail System, 2001 WL 1631718 15

Johnson v. Booker T. Washington Broadcasting Service, Inc., 234 F. 3d 501 (11th Cir. 2000) 5, 10

Johnson v. Danzig, 2000 WL 458887 11

Jones v. Department of Labor, 2002 WL 58220 11

Little v. Windermere Relocation, Inc., 265 F. 3d 903 (9th Cir. 2001) 10

McKethan-Jones v. Ohio Dept. of Health, 2001 WL 345782 12

Mendoza v. Borden, Inc., 195 F. 3d 1238 (11th Cir. 1999), cert. denied, 529 U.S. 1068 (2000) 8, 9

Moyo v. Gomez, 40 F. 3d 982 (9th Cir. 1994) 23

Newman v. Federal Express Corp., 266 F. 3d 401 (6th Cir. 2001) 12

Nichols v. Azteca Restaurant Enterprises, Inc., 256 F. 3d 864 (9th Cir. 2001) 10

Ogden v. Wax Works, Inc., 214 F. 3d 999 (8th Cir. 2000) 20

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) 16, 17

Palesch v. Missouri Commission on Human Rights, 233 F. 3d 560 (8th Cir. 2000) 12

TABLE OF AUTHORITIES – Continued

Page

Patron v. Indianapolis Public School Bd., 276 F. 3d 334 (7th Cir. 2002) 15

Patterson v. County of Fairfax, 2000 WL 655984 11

Payne v. McLemore's Wholesale & Retail Stores, 654 F. 2d 1130 (5th Cir. 1981) 23

Quarles v. McDuffie County, 949 F. Supp. 846 (S.D.Ga. 1996) 25

Raniola v. Bratton, 243 F. 3d 610 (2d Cir. 2001) 14

Rivera-Rodriguez v. Frito Lay Snacks Caribbean, 265 F. 3d 15 (1st Cir. 2001) 15

Rucker v. Higher Educational Aids Bd., 669 F. 2d 1179 (7th Cir. 1982) 22

Selim v. Michigan Jobs Commission, 2001 WL 1556937 12

Smith v. Oakland Scavenger Co., 1997 WL 661335 10

Speer v. Rand McNally & Co., 1996 WL 667810 (N.D.Ill. 1996) 20

Stevens v. United States Postal Service, 2001 WL 1298944 12

Stuart v. General Motors Corp., 217 F. 3d 621 (8th Cir. 2000) 13

Succar v. Dade County School Bd., 229 F. 3d 1343 (11th Cir. 2000) 9

Trepka v. Board of Education of the Cleveland City School Dist., 2002 WL 104801 12

TABLE OF AUTHORITIES – Continued

Page

Woods v. Champion Chevrolet, 2002 WL 848003 (9th Cir. 2002) 10

Woods v. Graphic Communications, 925 F. 2d 1195 (9th Cir. 1991) 10, 11

STATUTES:

28 U.S.C. § 1254 1

42 U.S.C. § 1981 7

42 U.S.C. § 1981a 2, 7, 17

42 U.S.C. § 2000e-3(a) 2, 4, 5, 18, 21

PETITION FOR A WRIT OF CERTIORARI

Petitioner Mignon Moore respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on August 10, 2001.

OPINIONS BELOW

The August 10, 2001 opinion of the court of appeals, which is not reported, is set out at pp. 1a-9a of the Appendix to this petition. The February 21, 2002 order of the court of appeals denying rehearing, which is not reported, is set out at pp. 39a-40a of the Appendix. The Final Report and Recommendation of the Magistrate Judge, dated August 3, 2000, which is not reported, is set out at pp. 11a-35a of the Appendix. The November 13, 2000 order of the district court, approving and adopting that Report and Recommendation, which is not reported, is set out at p. 36a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on August 10, 2001. A timely petition for rehearing and suggestion for rehearing en banc was denied on February 21, 2002. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title.

Section 102(c) of the 1991 Civil Rights Act, 42 U.S.C. § 1981a(c), provides in pertinent part:

> If a complaining party seeks compensatory or punitive damages under this section – (1) any party may demand a trial by jury. . . .

The Seventh Amendment to the United States Constitution provides in pertinent part:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . .

STATEMENT OF THE CASE

Petitioner Mignon Moore was hired by respondent in 1993 as a computer assisted design technician. In 1996 a then newly hired employee, Michael Taylor, began what would become a two year campaign of sexual harassment of Moore. Despite Moore's numerous complaints to two of her supervisors and to the company president, respondent failed to take effective action to end the harassment. Finally, on August 19, 1998, respondent dismissed Taylor; the company simultaneously dismissed Moore as well.

The harassment began in 1996 after Moore spurned Taylor's effort to begin a romantic relationship. At a lunch with other employees, Taylor asked Moore "would you like to show us how to eat a peter?" On another occasion he touched her buttocks with a coat hanger. Taylor suggested (incorrectly) that Moore had been a stripper, and discussed her body parts in a sexually-explicit manner related to that assertion. Taylor denounced Moore as a "bitch" when she spurned one invitation, and on another pressed her to go with him to a hotel. All this occurred in the context of incessant phone calls, notes, cards and e-mails, which Moore found offensive, and which she asked in vain that Taylor cease. Taylor telephoned Moore at her home as many as half a dozen times in a row, remarking, for example, that the dress she had worn that day "really showed off [her] butt." In one instance Taylor stalked Moore in his car, handing her roses in the middle of traffic and telling her to meet him in a nearby parking lot. Taylor often followed Moore around the office as well.

For more than a year Moore complained in vain to her supervisor, who took no corrective action. Finally, in March 1998 Moore complained to the company president, Travis Pruitt, Sr. Taylor was then warned that if he contacted Moore again he would be fired. Moore was told to notify Pruitt or another supervisor, Pete Smith, if she was harassed again, and was told that she should not herself contact Taylor.

The warning to Taylor was not effective. Over the months that followed he constantly made unwanted (sometimes anonymous) romantic overtures to Moore. Moore in turn repeatedly complained in vain to Pruitt and to two of her supervisors, providing them with copies of the written communications she had received from Taylor.

On August 19, 1998, Taylor repeatedly tried to telephone Moore, and followed her around the office throughout the day, staring at her and insisting that she call him. Finally, Moore threw up her arms in frustration, and told Taylor "Leave me alone."[1] Moore again complained to Pruitt about Taylor's actions. The company responded by dismissing *both* Taylor and Moore herself. The employer candidly asserted that it had fired Moore *because* she told Taylor "Leave me alone." Moore's effort to stop the harassment, the company insisted, was "insubordination" because it violated Pruitt's direction that Moore not "contact" Taylor. The mere act of throwing up her arms in exasperation, the employer asserted, was also a form of "contact" and thus an act of insubordination. (App. 6a).

After filing a charge with EEOC, Moore brought this action under Title VII of the 1964 Civil Rights Act. Moore urged that the company's own asserted reason for dismissing her was unlawful, and that Taylor's sexual

---

[1] Depo., pp. 134-35 ("Mr. Taylor early in that day had motioned for me to call him and I was not going to call him. . . . He walked by my desk several times during that day, always glaring at me and looking over me, whispering to me to call him at his desk. I was not going to call him. I had not called him and initiated any contact. I did not want to speak to him. He had followed me around the office. If I got up from my desk, he would be at least no more than five feet . . . or five steps behind me. . . . I had a . . . phone at my desk that had an LED readout that told me who was calling me. . . . Whenever he rang to me, I would not answer the phone. Whenever he would call, I would hang up the button. I didn't want to talk to him.

After a complete day of that, and him following me around the office, I finally, in complete disgust, . . . I had had enough. I had complained to [my supervisor], I had complained to [Pruitt], I had complained to [Smith]. Nothing was happening. So I finally . . . turned around, and I threw up my hands in the air, and I said, 'Leave me alone.'")

harassment had created a hostile work environment. Moore sought compensatory and punitive damages and specifically requested a jury trial. The case was referred to a magistrate judge, who recommended that the district court grant the employer's motion for summary judgment. (App. 11a-35a). The district judge approved that report and dismissed the action. (App. 36a). The court of appeals affirmed that dismissal. (App. 1a-9a).

With regard to Moore's termination, petitioner argued specifically that her action in telling Taylor to stop harassing her was protected by section 704(a) of Title VII, which forbids discrimination against an employee because she "opposed" unlawful discrimination. Dismissal because of that opposition, she insisted, was thus unlawful retaliation. The district court held the employer's professed explanation, far from being illegal, was instead a "legitimate, non-discriminatory reason for discharge." (App. 31a). In affirming the dismissal of this retaliation claim, the Eleventh Circuit held that the "opposition clause" of section 704(a) applies only to a "report" to "superiors about sexual harassment." (App. 6a).[2] Thus

---

[2] The relevant portion of the opinion reads as follows:

"[A]lthough Moore contends that her contact with Taylor was itself a complaint of sexual harassment, [Travis Pruitt Associates] explicitly instructed her to inform Smith or Pruitt if she had further problems with Taylor. Because Moore's gesture and statement to Taylor was not a report of an unlawful employment practice, this contact was not protected expression under Title VII. *See* 42 U.S.C. § 2000e-3(a); *see also Johnson v. Booker T. Washington Broadcasting Service, Inc.*, 234 F. 3d 501, 507 (11th Cir. 2000) (stating that statutorily protected expression includes filing complaints with the EEOC and complaining to superiors about sexual harassment).... [Travis Pruitt Associates]

(Continued on following page)

Moore's request to Taylor that he "leave [her] alone", according to the court of appeals, "was not protected expression under Title VII", and the company's action in dismissing Moore for voicing that objection was therefore based on "a legitimate non-discriminatory reason." (App. 6a).

With regard to Moore's sexual harassment claim, the employer claimed that the asserted harassment was not sufficiently severe or pervasive to create an objectively hostile environment. Although Moore had requested a jury trial, the district judge himself resolved this claim on the merits. "[T]he court *finds* that Taylor's conduct did not create an objectively hostile work environment." (App. 22a) (Emphasis added). The Eleventh Circuit held that the district judge had acted properly in deciding that issue himself, and agreed with the judge's finding that the environment to which Moore had been subjected was not in fact objectively hostile.

> The district court properly *determined* that Taylor's conduct did not create an objectively hostile work environment. Although Taylor's alleged statements and conduct were inappropriate, his acts fall short of the level of either severe or pervasive conduct sufficient to alter the terms or conditions of Moore's employment.

(App. 8a) (Emphasis added).

---

articulated a legitimate non-discriminatory reason for discharging Moore. . . ."

Moore filed a timely petition for rehearing and rehearing en banc. The petition was denied on February 21, 2002.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT ISSUE REGARDING THE RESPECTIVE ROLES OF JURIES AND JUDGES IN RESOLVING SEXUAL HARASSMENT CLAIMS

In 1991, after a protracted and sometimes bitter struggle, Congress amended Title VII to authorize juries to resolve discrimination claims, and to award compensatory and punitive damages. 42 U.S.C. § 1981a. The provision for jury trials was the most contentious part of the 1991 Civil Rights Act, because both opponents and supporters of the legislation anticipated that juries would at times decide cases differently than judges might. It was the proposed authorization of jury trials in sex discrimination cases, especially sexual harassment cases, that particularly divided members of Congress; jury trials had long been available in race cases under 42 U.S.C. § 1981.

In the wake of the 1991 Act, the controversy about the role of juries in harassment cases has shifted to the federal judiciary.[3] The courts of appeals have divided sharply about this issue. A number of circuits insist that it is for federal judges, at least in the first instance, to decide whether harassment created an objectively hostile

[3] *See* T. Beiner, "The Misuse of Summary Judgment in Hostile Environment Cases", 34 Wake Forest L. Rev. 71 (1999).

environment. These circuits have sought to define as a matter of law what types of harassing acts are "severe", how many such acts are "pervasive", and what combination of acts would cumulate into a hostile environment. Other circuits hold that the determination of whether harassment brought about a hostile environment is ordinarily a matter for a properly instructed jury.

In the instant case, despite the plaintiff's demand for a jury trial, the district judge made his own finding on the merits of Moore's harassment claim, "find[ing]" that the harassment "did not create an objectively hostile work environment." (App. 22a). The court of appeals, consistent with Eleventh Circuit precedent, concluded that it was appropriate on summary judgment for the district judge to decide whether there was a hostile environment, rather than permitting that issue to go to trial for resolution by a jury. The appellate court agreed with the district judge's conclusion that the environment at Moore's place of work was not actually hostile, as well as with the district judge's underlying assumption that this was an issue for the judiciary to resolve. (App. 8a).

The decision in the instant case has its roots in a sharply divided en banc Eleventh Circuit decision in *Mendoza v. Borden, Inc.*, 195 F. 3d 1238 (11th Cir. 1999), *cert. denied*, 529 U.S. 1068 (2000). (App. 22a). A majority of the Eleventh Circuit in *Mendoza* concluded that the court itself should decide whether a hostile environment existed. "*[W]e* conclude that the conduct established by Mendoza was not sufficiently severe or pervasive to alter Mendoza's terms or conditions of employment." 195 F. 3d at 1248

(Emphasis added).[4] Four dissenting judges insisted that the proper inquiry was not whether the court believed the harassment had created a hostile environment, but whether a "reasonable juror" could have drawn such a conclusion. 195 F. 3d at 1259 (Tjoflat, J., dissenting). In her separate dissent Judge Barkett objected that the majority opinion was inconsistent with the 1991 Civil Rights Act.

> [T]he majority has usurped the traditional role of the rightful finder of fact. In the Civil Rights Act of 1991, Congress specifically amended Title VII . . . and specifically provided all plaintiffs seeking compensatory or punitive damages to have his or her case heard before a jury. . . . The mistrust of juries evidenced by the majority is at odds with the specific directive of Congress that the jury is to decide whether gender discrimination has occurred in the workplace.

195 F. 3d at 1278.

The Eleventh Circuit has extended *Mendoza* to disputes about whether or not the motive behind alleged harassment was gender. *Succar v. Dade County School Bd.*, 229 F. 3d 1343, 1345 (11th Cir. 2000) (affirming award of summary judgment because "we agree with the district court's *finding* that Ms. Lorenz's harassment of Plaintiff was not the result of Plaintiff's gender") (emphasis added). When it has reversed an award of summary judgment in an harassment case, the Eleventh Circuit has done so only

---

[4] *See id.* at 1248 ("Mendoza did not endure conduct that was so severe or pervasive that it altered the terms or conditions of her employment"), 1249 ("none of the conduct alleged by Mendoza was severe"; conduct alleged was not "actionable hostile environment sexual harassment").

based on a finding by the appellate panel itself that the harassment did create a hostile environment; in such cases the sole issue remaining for the trier of fact on remand appears to be whether the harassment actually occurred. *Johnson v. Booker T. Washington Broadcasting Service, Inc.*, 234 F. 3d 501, 509 and n. 8 (11th Cir. 2000). Thus the panel in the instant case properly understood circuit precedent to authorize the appellate court itself to determine whether the harassment inflicted on Moore had in fact created a hostile environment.

The rule followed in the Eleventh Circuit has been endorsed by a number of other circuits. The Ninth Circuit has repeatedly held that the issue of whether harassment created a hostile environment is actually a question of law.

> The only issue is whether the conduct . . . was sufficiently severe or pervasive to alter the terms and conditions of . . . employment and create an abusive working environment. This presents a question of law. . . .

Woods v. Champion Chevrolet, 2002 WL 848003 *3 (9th Cir. 2002) (reversing award of summary judgment); *see Fuller v. City of Oakland, California*, 47 F. 3d 1522, 1527 (9th Cir. 1995) ("whether the conduct . . . was sufficiently severe and pervasive to constitute sexual harassment is a question of law") (reversing finding after bench trial of no hostile environment).[6] It is manifest from a comparison of

---

[6] *See Little v. Windermere Relocation, Inc.*, 265 F. 3d 903, 910-11 (9th Cir. 2001) (reversing summary judgment for employer); *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F. 3d 864, 871 (9th Cir. 2001) (reversing finding after bench trial that environment was not hostile); *Smith v. Oakland Scavenger Co.*, 1997 WL 661335 *4 (9th Cir.); *Woods v. Graphic Communications*, 925 F. 2d 1195, 1201 (9th Cir. 1991) (reversing summary judgment for employer).

the decisions involved that the Ninth and Eleventh Circuits have sharply conflicting views about what types of harassment will create a hostile environment; they agree, however, that this is an issue for judges to decide.

Three other circuits also insist that a judge should resolve a summary judgment motion in a harassment case by deciding himself whether the harassment created a hostile environment. This practice is relied on with considerable frequency, and thus has great practical importance. Within just the last two years, for example, there were seven decisions in the Fourth Circuit containing appellate findings that the harassment complained of had not in fact created a hostile environment.[6] That circuit's method of resolving these cases is well illustrated

---

[6] *Jones v. Department of Labor*, 2002 WL 58220 *2 (4th Cir.) ("the totality of the circumstances shows an absence of sufficiently severe or pervasive harassment"); *Gurganus v. Beneficial North Carolina, Inc.*, 2001 WL 1627655 *2 (4th Cir.) (plaintiff "failed to *demonstrate* that any alleged harassing conduct ... was based on her age.") (emphasis added); *Green v. Caldera*, 2001 WL 1098095 *2 (4th Cir.) ("Green has failed to satisfy the objective analysis ..., as the incidents of which she complains were of questionable severity, and were more offensive than physically threatening or humiliating."); *EEOC v. R & R Ventures*, 244 F. 3d 334, 340 (4th Cir. 2001) ("*We* have no hesitation in concluding that [the harasser's] alleged conduct was so severe ... that it discriminatorily altered [the] working conditions") (emphasis added); *Elkins v. Pharmacy Corp. of America*, 2000 WL 962669 *2 (4th Cir.) (harassment "was neither severe nor threatening and did not interfere with Elkins' work performance"); *Patterson v. County of Fairfax*, 2000 WL 655984 *4 (4th Cir.) ("Patterson's allegations, assuming they are true, are simply insufficient to satisfy the requirement that the harassment be so severe as to create a hostile working environment."); *Johnson v. Danzig*, 2000 WL 458887 *2 (4th Cir.) ("These allegations are insufficient to establish a hostile environment because the incidents were neither severe nor pervasive.")

by the leading case of *Hopkins v. Baltimore Gas and Electric Co.*, 77 F. 3d 745 (4th Cir. 1996).

> After carefully considering the entire record before us, . . . *we are convinced* that the conduct of which Hopkins complains was neither sufficiently severe nor sufficiently pervasive to create an environment that a reasonable man would find hostile or abusive.

77 F. 3d at 753 (Emphasis added). During the same two year period there were seven similar appellate findings in cases in the Sixth Circuit,[7] and five such findings by panels in the Eighth Circuit.[8]

---

[7] *Trepka v. Board of Education of the Cleveland City School Dist.*, 2002 WL 104801 *5 (6th Cir.) (harassment was "not sufficiently severe to constitute [unlawful] harassment under our precedents"); *Selim v. Michigan Jobs Commission*, 2001 WL 1556937 *2 (6th Cir.) ("Selim has not made out a prima facie case of [actionable] harassment because she has not shown that the Commission's actions were based on her membership in a protected class or that they unreasonably interfered with her work performance."); *Newman v. Federal Express Corp.*, 266 F. 3d 401, 405 (6th Cir. 2001) ("*we find* that Newman has failed to show that the [harassment was] subjectively hostile.") (emphasis added); *Stevens v. United States Postal Service*, 2001 WL 1298944 *2 (6th Cir.) (the "incidents were not enough to alter the conditions of Stevens's employment."); *Hibbler v. Regional Medical Center at Memphis*, 2001 WL 700829 *2 (6th Cir) (harassment did "not amount to a change in the terms and conditions of Hibbler's employment so as to constitute a racially hostile work environment."); *Gwen v. Regional Transit Authority*, 2001 WL 345793 *4 (6th Cir.) (harasser's conduct "did not create a hostile work environment as a matter of law."); *McKethan-Jones v. Ohio Dept. of Health*, 2001 WL 345782 *7 (6th Cir.) ("the conduct in this case is simply neither severe nor pervasive enough to meet this circuit's . . . definition of an objectively hostile work environment.")

[8] *Palesch v. Missouri Commission on Human Rights*, 233 F. 3d 560, 566 (8th Cir. 2000) ("*We* . . . *find* that the evidence presented by Palesch failed to demonstrate . . . that the harassing conduct was 'so severe or

(Continued on following page)

Several other circuits, however, have emphatically rejected this entire approach, insisting to the contrary that summary judgement can be granted in a harassment case only if no reasonable jury could find that the harassment involved created an objectively hostile environment. In *Gallagher v. Delaney*, 139 F. 2d 338 (2d Cir. 1998), the Second Circuit insisted:

> A federal judge is not in the best position to define the current sexual tenor of American cultures in their many manifestations. . . . [A] jury made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment . . . . Whatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on

---

pervasive that it create[d] an abusive working environment.'") (emphasis added); *Clearwater v. Independent School District No. 166*, 231 F. 3d 1122, 1128 (8th Cir. 2000) (harassing "conduct was not so 'extreme' that it 'amount[ed] to a change in the terms and conditions of employment.'"); *Bradley v. Widnall*, 232 F. 3d 626, 631-32 (8th Cir. 2000) ("While the conduct cited by Bradley may have resulted in a frustrating work situation, *we do not believe* that it was so severe or pervasive as to have affected a term, condition, or privilege of her employment.") (emphasis added); *Hocevar v. Purdue Frederick Co.*, 223 F. 3d 721, 738 (majority opinion) (harassment fell "short of proof of a hostile work environment"), 729 (dissenting opinion) ("The ultimate determination as to whether the harassment was pervasive must be made by a jury.") (8th Cir. 2000); *Stuart v. General Motors Corp.*, 217 F. 3d 621, 632 (8th Cir. 2000) ("*this Court finds* Stuart failed to consider herself subject to unwelcome sexual harassment") (emphasis added).

> nuances, subtle perceptions, and implicit communications

139 F. 2d at 342. The Second Circuit has applied this reasonable juror standard on repeated occasions. *E.g.*, *Raniola v. Bratton*, 243 F. 3d 610, 618 (2d Cir. 2001) ("the evidence was legally sufficient for a reasonable jury to find that Raniola was subjected to a hostile work environment because she was a woman."); *Fitzgerald v. Henderson*, 251 F. 3d 345, 366 (2d Cir. 2001) (reversing award of summary judgment because the district court had "resolved questions of fact that are reserved for decision by a jury."); *Howley v. Town of Stratford*, 217 F. 2d 141, 154 (2d Cir. 2000) (reversing award of summary judgment because "[i]t cannot be concluded as a matter of law that no rational jury could view [the harassment] as humiliating and resulting in an intolerable alteration of Howley's working conditions").

In the Third Circuit the resolution of a summary judgment motion in an harassment case also turns on whether a reasonable jury could have found the harassment created a hostile environment. In *Abramson v. William Patterson College of New Jersey*, 260 F. 3d 265 (3d Cir. 2001), the court of appeals repeatedly invoked this standard.

> The proper inquiry at this stage was whether a reasonable factfinder could view the evidence as showing that Abramson's treatment was attributable to her religious faith and practice. . . . [A] jury could find that the harassment was pervasive. . . . A jury could also reasonably conclude that Abramson was detrimentally affected by the environment. . . . Abramson made a sufficient showing . . . that a jury could find that a reasonable person of

> her religion would find the conduct alleged to be so harmful that it altered her working conditions.

260 F. 3d at 277-80; *see Aman v. Cort Furniture Rental Corp.*, 85 F. 3d 1074, 1082 (3d Cir. 1996) ("a reasonable jury could conclude that the working condition at Cort Furniture was pervaded by discriminatory 'intimidation, ridicule and insult.'").

Similarly, in both the First and Seventh Circuits appellate panels do not make their own determination of whether a hostile environment existed, but instead inquire only whether a reasonable jury could have found that the harassment had brought about that result. *E.g.*, *Patron v. Indianapolis Public School Bd.*, 276 F. 3d 334, 339 (7th Cir. 2002) ("a reasonable jury could not have determined that Patron's treatment was so severe or pervasive as to alter the conditions of her employment in a significant way."); *Cook v. Henderson*, 2002 WL 252535 *3 (7th Cir.) ("No reasonable jury could find these . . . incidents severe or pervasive enough to alter the conditions of Cook's employment."); *Rivera-Rodriguez v. Frito Lay Snacks Caribbean*, 265 F. 3d 15, 24 (1st Cir. 2001) (issue raised by motion for summary judgment was "whether a reasonable jury could find that Rivera was subjected to a hostile work environment."); *Hudson v. C.P. Rail System*, 2001 WL 1631718 *1 (7th Cir.) ("The district court properly found that no reasonable jury could conclude that th[e] incidents amounted to a hostile work environment.")

Where a jury trial has been requested, a judicial determination of whether harassment created a hostile work environment – such as that in the decision below – is squarely inconsistent with the decisions of this Court. The Court has made clear that whether or not harassment

brought about a hostile environment is an issue for the trier of fact, not a question of law. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), held:

> [T]he very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality. . . .
>
> [T]he District Court erred in relying on whether the conduct "seriously affect[ed] plaintiff's psychological well-being" or led her to "suffe[r] injury." Such an inquiry may needlessly focus *the factfinder's* attention on concrete psychological harm, an element Title VII does not require.

510 U.S. at 22 (Emphasis added). Similarly, in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Court made clear that disputes about the animus underlying alleged harassment are necessarily factual issues.

> *A trier of fact* might reasonably find [gender based] discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.

523 U.S. at 80 (Emphasis added).

In the Eleventh Circuit and elsewhere, however, the trier of fact is not permitted to decide either of these issues unless the district judge, in resolving a summary judgment motion, has first concluded that the harassment indeed created a hostile environment and that the victim

was harassed because of his or her gender, race, national origin or religion. That practice is contrary to the holdings of *Harris* and *Oncale* that these are issues for the trier of fact; under *Harris* and *Oncale* summary judgment can only be awarded if no reasonable trier of fact could resolve one of these issues in favor of the plaintiff.

The practice that was utilized in this case, and that prevails in five circuits, amounts to judicial nullification of Congress's 1991 decision to grant a right to trial by jury in Title VII cases. Under that practice a plaintiff in a harassment case cannot survive summary judgment, and obtain the jury trial guaranteed by Congress, unless a judge (or several appellate judges) first concludes that there was a hostile environment violative of Title VII. Thus instead of transferring this determination from judges to juries, as Congress clearly intended, this practice has converted the 1991 Civil Rights Act into a requirement that a plaintiff convince *both* a judge (on summary judgment) and then a jury (at trial) that unlawful harassment occurred.

The question of whether judges or juries should resolve such discrimination issues is a matter to which Congress attached the highest importance when it enacted the 1991 Civil Rights Act. 42 U.S.C. § 1981a(c). Congress understood full well that section 1981a(c) would work a sea change in the enforcement of Title VII, and after a long and difficult struggle decided to make precisely that fundamental alteration in the nation's premier civil rights law. There are, to be sure, harassment cases in which summary judgment would be appropriate; the circuits which recognize the central role of juries under section 1981a(c) have not hesitated to award summary judgment in appropriate circumstances. But Congress intended that

in resolving such summary judgment motions judges would inquire only whether a reasonable jury could find the existence of a hostile environment, and would not presume to supplant the jury in making that fact-bound determination.

II. THIS CASE PRESENTS AN IMPORTANT INTER-CIRCUIT CONFLICT REGARDING WHETHER EMPLOYEES ARE PROTECTED BY TITLE VII IF THEY RESIST HARASSMENT OR OTHER UNLAWFUL DISCRIMINATION

Petitioner's retaliation claim presents a specific and recurring legal issue. The employer in this case conceded, indeed insisted, that it had fired Moore because she had admonished her harasser, "Leave me alone." The fact that Moore had told the harasser that his actions were unwelcome, the court of appeals held, constituted a "legitimate, non-discriminatory reason for discharging Moore." (App. 6a).

Section 704(a) of Title VII forbids discrimination against any worker because he or she "opposed" unlawful harassment or other discrimination. 42 U.S.C. § 2000e-3(a). That protection, the Eleventh Circuit insisted, is limited to a "report" of discrimination to "superiors" or the EEOC. (App. 6a). The court of appeals thus concluded that Moore's admonition to "leave me alone" was not protected by Title VII, since it was an objection to, rather than a report of, harassment. This holding was entirely distinct from the Eleventh Circuit's analysis of Moore's harassment claim; under the decision below the dismissal of

Moore would have been entirely legal even if the harassment itself had violated Title VII.[9]

The Second Circuit has construed section 704(a) in a related, although somewhat broader manner. In *Cruz v. Coach Stores, Inc.*, 202 F. 3d 560 (2d Cir. 2000), the harasser commented to Cruz in front of several colleagues that her "nipples [were] erect." 202 F. 3d at 564. An argument ensued, during which the harasser approached Cruz in a threatening manner and called her a "f___ing cunt." *Id.* Cruz responded by slapping the harasser. The employer then dismissed Cruz on the ground that the slap constituted a "physical assault." The Second Circuit held that the dismissal was lawful under section 704(a), defining the opposition protected by Title VII as

> includ[ing] activities such as "making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges."

202 F. 3d at 566. The court stopped short of holding that all resistance to harassment was unprotected, stressing that Cruz's action was unprotected because she had "many options for resisting . . . including leaving the room and reporting the incident." 202 F. 3d at 567. Although the

---

[9] The court of appeals' conclusion that the harassment was not sufficiently severe or pervasive to create a hostile environment did not preclude an otherwise well pleaded retaliation complaint. In the Eleventh Circuit, as elsewhere, section 703(a) is construed to protect reasonable, good faith opposition to asserted discrimination, even if the underlying discrimination claim ultimately fails on the merits. *Harper v. Blockbuster Entertainment Corp.*, 139 F. 3d 1385, 1388 (11th Cir. 1998).

Second Circuit's decision construes section 704(a) in a constricted manner, even in that circuit Moore would have been protected by the statute, since her repeated past complaints about Taylor's harassment had been to no avail.

The interpretation of section 704(a) in this case and (at least frequently under) *Cruz* creates an express judicial sanction for employers who want to punish the harassment victim herself. Lower courts applying this rule have repeatedly upheld the legality of discriminating against harassment victims because they resisted the actions of the harasser in question. *E.g.*, *Fitzgerald v. Henderson*, 36 F. Supp. 2d 490, 494, 498-99 (N.D.N.Y. 1999) (section 704(a) does not protect employee driven from her job because she told supervisor "she was not interested in engaging in a sexual relationship with him"); *Speer v. Rand McNally & Co.*, 1996 WL 667810 *8 n. 4 (N.D.Ill. 1996) (section 704(a) does not protect worker from retaliation because she rejected sexual advances by her supervisor); *Del Castillo v. Pathmark Stores, Inc.*, 941 F. Supp. 437, 438 (S.D.N.Y. 1996) (section 704(a) "claim cannot encompass instances where the 'protected activity' consists . . . of declining a harasser's sexual advances"); *cf. Bampoe v. Coach Stores, Inc.*, 93 F. Supp. 2d 360, 365, 372 (S.D.N.Y. 2000) (section 706(a) does not protect an employee dismissed for admonishing a co-worker not to use the epithet's "nigger" and "spic").

Most circuits, not surprisingly, have rejected this narrow interpretation of section 704(a). The Eighth Circuit has twice held that an employer cannot retaliate against a sexual harassment victim because she spurned the advances of the harasser. In *Ogden v. Wax Works, Inc.*, 214 F. 3d 999 (8th Cir. 2000), the plaintiff was repeatedly

grabbed by her supervisor; she fended him off by pushing him away, telling him not to touch her, and on one occasion with a physical threat. 214 F. 3d at 1003. The harasser retaliated in a variety of ways, including denying the victim a raise. The court of appeals upheld a finding of unlawful retaliation.

> Wax Works next argues that Ogden's retaliation claim must fail because she did not engage in the "protected activity" requisite for this theory of liability. Ogden maintains she engaged in "the most basic form of protected activity" when she told her supervisor . . . to stop his offensive conduct. . . . We agree with Ogden. Employers may not retaliate against employees who "oppose discriminatory conduct," *see* 42 U.S.C. § 2000e-3(a), and the jury reasonably concluded Ogden did so when she told [her supervisor] to stop his offensive behavior.

214 F. 3d at 1007 (footnotes omitted).

In *Excel Corp. v. Bosley*, 165 F. 3d 635 (8th Cir. 1999), after a long course of verbal and physical abuse, the harasser approached the plaintiff, resumed the harassment, and called her a variety of names, such as "fucking bitch." The plaintiff pushed the harasser once in the chest and told him to go back to his job. 165 F. 3d at 638. The plaintiff was fired on the ground that she had violated a company rule against physical contact. The court of appeals rejected the company's argument that it had dismissed the plaintiff for a legitimate reason.

> When an employee is fired because he acted to defend himself against harassment, which supervisors failed to take reasonable measures to prevent or correct, the termination process

> cannot be said to be free from discrimination. . . . This is so even if the ultimate decision maker was moved purely by a legitimate concern about personnel matters. . . . [The plaintiff] testified that she shoved [the harasser] out of the way. As a result of this action [plaintiff] was fired. The evidence was sufficient for a reasonable fact-finder to find that the termination process was tainted by sex discrimination even if the actual decision to terminate was not.

165 F. 3d at 639.

The First Circuit has also concluded that an employer cannot dismiss a worker because he took action to protect himself from harassment. In *DeGrace v. Rumsfeld*, 614 F. 2d 796 (1st Cir. 1980), the plaintiff, a black firefighter, had received several anonymous death threats, and had found his firefighting equipment deliberately damaged. The plaintiff, afraid that his life was in danger, stayed away from work for several weeks. His employer then fired DeGrace for absenteeism. The court of appeals held that DeGrace could not be dismissed for seeking in this manner to avoid the harassment at issue.

> If because of the culpable neglect of supervisory personnel plaintiff was put in reasonable fear for his personal safety and if "but for" the fear thus engendered plaintiff would not have absented himself, we do not think [the employer] could properly discharge plaintiff for unauthorized absence.

614 F. 2d at 804. Similarly in *Rucker v. Higher Educational Aids Bd.*, 669 F. 2d 1179 (7th Cir. 1982), the Seventh Circuit upheld a retaliation claim where the dismissal of the plaintiff had been based, at least in part,

on a memorandum which the plaintiff had written to a harasser urging him to stop harassing a third party. 669 F. 2d at 1180.

More broadly, the holding in this case and *Cruz* – that section 704(a) protects only reports of discrimination – conflicts with the majority rule that section 704(a) covers many other forms of opposition. *E.g.*, *EEOC v. HBE Corp.*, 135 F. 3d 543, 550 (8th Cir. 1998) (section 704(a) protects worker from dismissal because he disobeyed an order to engage in racial discrimination); *Drake v. Minnesota Min. & Mfg. Co.*, 134 F. 3d 878, 885 (7th Cir. 1998) (section 704(a) protects worker from retaliation for making comments printed in a local newspaper); *Aman v. Cort Furniture Rental Corp.*, 85 F. 3d 1074, 1055 (3d Cir. 1996) (section 704(a) forbids dismissal of employee for disobeying order to collect derogatory information about black employees); *Moyo v. Gomez*, 40 F. 3d 982, 985 (9th Cir. 1994) (section 704(a) forbids dismissal of employee for refusing to engaged in racial segregation); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F. 2d 1130, 1135-36 (5th Cir. 1981) (section 704(a) protects employees who engage in boycotts or picketing).

The decision below is inconsistent as well with the opinions of this Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Under the decision below the merits of Moore's retaliation claim were entirely distinct from the merits of her harassment claim. Thus even if the harassment itself had been found unlawful, it still would have been permissible for the employer to fire Moore for objecting "Leave me alone." But *Faragher* and *Ellerth* both hold that an employer will always be liable for sexual harassment if it "culminate[s]" in a tangible employment

action against the harassment victim. *Ellerth*, 524 U.S. at 763; *see Faragher*, 524 U.S. at 807. *Faragher* and *Ellerth* assuredly contemplated that Title VII would protect a harassment victim who was fired for resisting her harasser's advances; that is the very paradigm with which those decisions were concerned. Under the decision below, however, such a victim would only have a claim for the harassment suffered on the job, and could not sue for the dismissal that ultimately resulted. That is a nonsensical result under *Faragher* and *Ellerth*.

No less importantly, *Faragher* emphasized that Title VII requires a harassment victim to mitigate her damages by trying to end the harassment. 524 U.S. at 806. The practical effect of the decision below and of *Cruz* is that an employee who seeks to end the harassment by telling the perpetrator to stop can be dismissed for doing so. If an employee rejected a supervisor's demands for sex, the supervisor could fire her on the ground that her rejection was rude, or loud, or implied he was sexually undesirable. The rejection itself would be unprotected – since it was not a report to superiors – and there would often be no harassment claim either, since the advances were rebuffed.

This conflict regarding the scope of section 704(a) is of great importance.[10] Harassment victims frequently and quite reasonably tell their harassers to stop, and emphatically reject demands for sexual favors. Victims who do so often face retaliation, including dismissal; now employers

---

[10] Some courts, rather than relying on section 704(a), have held that the sort of retaliation that occurred here constitutes discrimination under section 703. The second question presented is not limited to section 704(a).

are successfully arguing that such dismissals themselves are actually legal under Title VII. See cases cited, *supra* p. 20. In other instances those arguments have been rejected. *Fleming v. South Carolina Dept. of Corrections*, 952 F. Supp. 283, 286, 288 (D.S.C. 1996) (worker transferred because she adamantly refused to have sex with her supervisor); *Quarles v. McDuffie County*, 949 F. Supp. 846, 849, 853 (S.D.Ga. 1996) (worker dismissed because she pushed away harasser who had grabbed her and warned him, "It's going either to stop or I'm going to tell somebody"); *Armbruster v. Epstein*, 1996 WL 289991 *1, *3 (E.D.Pa. 1996) (retaliation against plaintiff because she pulled away from harasser who had grabbed her and told him not to try to kiss her again); *EEOC v. Domino's Pizza, Inc.*, 909 F. Supp. 1529, 1534, 1536 (M.D.Fla. 1995) (employee discharged because he ordered out of his office a harassing supervisor); *Boyd v. James S. Hayes Living Health Care Agency, Inc.*, 671 F. Supp. 1155, 1159, 1167 (W.D.Tenn. 1987) (employee discharged because she refused to watch pornographic movies with her supervisor); *cf. Black v. City & County of Honolulu*, 112 F. Supp. 2d 1041, 1049 (D.Hawai'i 2000) (retaliation against plaintiff for seeking to transfer to a job not under supervision of the harasser). The problem of retaliation against victims who resist sexual harassment, and the scope of the protection afforded to those victims by Title VII, is of recurring and manifest importance.

Harassment victims in the Second and Eleventh circuits face a cruel dilemma when a supervisor demands sexual favors on pain of dismissal. If they reject that demand and are fired as a result, they will have no claim under section 704(a), because resistance to harassment is not deemed protected activity. But if, in order to protect their jobs, they submit to the demand and then complain

to management or EEOC, they will not only suffer the affront of that coerced sexual act, but will also be met with arguments that their submission demonstrated that the coerced activity was actually welcome. In the instant case the employer took precisely that approach, not only insisting that it (permissibly) fired Moore for telling her harasser to "[l]eave me alone," but also arguing that Moore actually found the harasser's actions quite acceptable. (App. 23a). In cases such as this harassment victims may well be forced to choose between forfeiting their sexual harassment claims and forfeiting their jobs.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

KRISTINE E. ORR
E. WYCLIFFE ORR
ORR & ORR
P.O.Box 2944
641 Spring St.
Gainesville, GA 30503
(770) 534-1980

ERIC SCHNAPPER*
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

Counsel for Petitioner

**Counsel of Record*

United States Court of Appeals
For the Eleventh Circuit

No. 00-16521

District Court Docket No.
99-01901-CV-RLV-1

MIGNON MOORE,

Plaintiff-Appellant
Versus

TRAVIS PRUITT & ASSOCIATES, P.C.,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Georgia

(August 10, 2001)

Before TJOFLAT, EDMONDSON and BLACK, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Mignon Moore appeals the district court's grant of summary judgment for Travis Pruitt & Associates, P.C. ("TPA") in this employment discrimination action.[1] Moore alleged that TPA violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, by

---

[1] The district court dismissed without prejudice Moore's state law claims of negligent failure to protect and negligent retention. Moore does not argue that the district court erred by doing so, and this argument is deemed abandoned. *Rowe v. Schreiber*, 139 F.3d 1381, 1382 n.1 (11th Cir. 1998).

subjecting her to a sexually hostile work environment and by retaliating against her for reporting the harassment. No reversible error has been shown, we AFFIRM.

I. BACKGROUND

TPA provides services in consulting, civil engineering, surveying, and landscape architecture. TPA hired Moore as a Computer Aided Drafting ("CAD") technician in March 1993. Michael Taylor was hired by TPA as a CAD technician in June 1996. Moore alleged that, shortly after Taylor started to work at TPA, he began telling her on a regular basis that she was beautiful. Moore testified that in the fall of 1996, she informed her immediate supervisor, Andy Bellflower, about Taylor's comments; but no action was taken.

Moore testified that she attempted to be friends with Taylor, but his inappropriate conduct continued. Moore alleged that, despite her requests that Taylor stop calling her, he continued to call her at home and at her desk making inappropriate comments. Moore testified that on one occasion Taylor told her that the dress she had worn "really showed off [her] butt," and on another occasion that he had heard that she used to be a stripper. Moore testified that in addition to calling her, Taylor frequently contacted her through notes, cards, and e-mail, many of which she found inappropriate.[2] Moore alleged that one of these notes included Taylor inviting her to go to Hawaii and stay in a hotel with him.

---

[2] Moore testified that she found some of the notes, cards, and e-mail offensive because she had requested that Taylor not contact her.

In addition to the notes and phone calls, Moore contended that at a lunch with other TPA employees Taylor asked her if she would "like to show us how to eat a peter?" Moore testified that on this same day Taylor "touched me with a coat hanger on my butt." Moore alleged that on another occasion, in response to her refusal of Taylor's invitation to go to the movies, he called her a "bitch." Moore contended that Taylor then waited three or four hours for her to leave work so that he could apologize, followed her in his car, handed her roses while she was stopped in traffic, and told her to meet him at a nearby parking lot to talk. Moore testified that Taylor also told other TPA employees that she would bring a sexual harassment claim against them.

On 5 March 1998, Moore complained to TPA's president, Travis Pruitt, Sr., about Taylor's behavior, but stated that she did not want Taylor to lose his job. Pruitt asked Moore to communicate with Taylor only through a supervisor and told her inform him or Pete Smith, TPA's comptroller, if she had problems with Taylor. On 9 March 1998, TPA issued a letter to Taylor informing him of Moore's allegations, instructing him not to contact her, and informing him that, if he did contact Moore, his employment would be terminated. Moore also received a letter acknowledging her allegations and stating that she and Taylor were not to communicate except through a supervisor.

In April 1998, Moore complained to Smith that she thought that Taylor had left an unsigned note on her desk which stated "It's not that bad — after all." Because he could not conclusively determine whether Taylor had written the note, Smith did not take action against Taylor.

Moore testified that on 19 August 1998, Taylor motioned and whispered for her to call him, walked by her desk several times, followed her around the office, glared at her, and attempted to call her at her desk. Moore testified that she finally threw her arms up in the air and told Taylor to leave her alone. On this same day, Moore complained to Pruitt that Taylor had continued to contact her. Moore testified that at this time she expressed concern that she would lose her job, and Pruitt told her that she "had nothing to worry about." Pruitt terminated Taylor's employment with TPA because he had contacted Moore despite the "no-contract" rule. Pruitt testified that he also made the decision to discharge Moore for insubordination because, during his last meeting with Moore, she informed him that "she had gone to a place where she was in the clear view of Mike Taylor and had gestured at him and had issued some statement to him. And that was not what she was supposed to do."

On 22 June 1999, Moore filed this employment discrimination action in the state court. TPA subsequently removed the action to federal court. The district court, adopting the magistrate judge's report and recommendation, granted TPA's motion for summary judgment and dismissed Moore's state law claims without prejudice.

II. DISCUSSION

We review a district court's grant of summary judgment *de novo*, with all evidence and reasonable factual inferences viewed in the light most favorable to nonmoving part. *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted, "if the

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P.56(c).

A. Moore's retaliation claim

Moore argues that the district court erred in determining that TPA offered a legitimate non-discriminatory reason for her discharge and that this reason was not a pretext for retaliation. Moore contends that TPA failed to offer a legitimate non-discriminatory reason for terminating her employment because (1) she was not informed she would be terminated if she violated the "no-contact" rule; (2) Taylor previously had violated the rule without consequences; and (3) her contact with Taylor was itself a complaint of sexual harassment for which she should not have been discharged. Moore contends that Pruitt's statement to Taylor that he was "washing his hands of it, this whole matter," and the fact that when she made her final complaint, Pruitt told her that she would not be fired and did not inform her that he considered her action to be insubordination, demonstrates that TPA's articulated reason for terminating her employment was a pretext for retaliation.

Title VII prohibits employers from retaliating against employees who report unlawful employment practices. 42 U.S.C. §2000e-3(a). Once a plaintiff establishes a *prima facie* case of retaliation, the employer must proffer a legitimate, non-discriminatory reason for the adverse employment action. *Holifield v. Reno*, 115 F.3d 1555, 1556 (11th Cir. 1997). If the employer offers legitimate reasons

for the employment action, the plaintiff must then demonstrate that the employer's proffered explanation is a pretext for retaliation. *Id.*

We assume, as the district court did, that Moore established a *prima facie* case of retaliation.[3] We therefore turn to whether TPA articulated a legitimate non-discriminatory reason for terminating Moore. Pruitt, TPA's president, testified that he fired Moore for insubordination because she admitted that she contacted Taylor after being instructed not to do so. Although Moore contends that she was not informed that she could be discharged for contacting Taylor, TPA's letter acknowledging Moore's sexual harassment claims instructed her not to communicate with Taylor except through a supervisor. Furthermore, although Moore contends that her contact with Taylor was itself a complaint of sexual harassment, TPA explicitly instructed her to inform Smith or Pruitt if she had further problems with Taylor. Because Moore's gesture and statement to Taylor was not a report of an unlawful employment practice, this contact was not protected expression under Title VII. *See* 42 U.S.C. §2000e-3(a); *see also Johnson v. Booker T. Washington Broadcasting Service, Inc.*, 234 F.3d 501, 507 (11th Cir. 2000) (stating that statutorily protected expression includes filing complaints with the EEOC and complaining to superiors about sexual harassment).

Because TPA articulated a legitimate non-discriminatory reason for discharging Moore, the burden shifted to Moore to demonstrate that TPA's proffered explanation

---

[3] The district court adopted the magistrate judge's report and recommendation making this determination.

was a pretext for retaliation. Moore failed to introduce evidence that permits the inference that the reason proffered by TPA for Moore's termination was false. Pruitt's alleged comments and the fact that he did not immediately inform Moore that he considered her contact with Taylor to be insubordination do not permit such an inference by a preponderance of the evidence. *See Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993). The district court did not err by granting TPA's motion for summary judgment on Moore's retaliation claim.

B. Moore's hostile work environment claim

Moore argues that the district court erred in determining that she had not established the elements of a hostile environment claim. She contends that Taylor's harassment was severe and pervasive and affected the terms, conditions, or privileges of her employment. Moore contends that as a result of not working in a safe environment, she worked fewer hours than she normally would have and was unable to concentrate. Moore further contends that TPA failed to take adequate steps to protect her from Taylor's harassment despite her complaints and, therefore, is liable.

To establish a hostile-environment sexual harassment claim under Title VII, Moore must show that (1) she belongs to a protected group; (2) that she has been subject to unwelcome harassment; (3) the harassment was based upon her sex; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) a basis for holding the employer liable.

Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982).

To state a claim under Title VII, sexual harassment must be both subjectively and objectively offensive. *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2283 (1998). In addition to the employee perceiving the harassment as offensive, the environment must be one that a reasonable person would find hostile or abusive. *Id.* "[T]he objective severity of harassment must be judged from the perspective of a reasonable person in the plaintiff's position, considering all of the circumstances." *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1246 (11th Cir. 1999). To determine whether harassment was objectively offensive enough to have altered the terms of conditions of Moore's employment, we consider the frequency and severity of the alleged conduct. *Id.* We also must determine whether the conduct was physically threatening or humiliating, or merely an offensive utterance; and whether it unreasonably interfered with Moore's job performance. *Id.*

The district court properly determined that Taylor's conduct did not create an objectively hostile work environment. Although Taylor's alleged statements and conduct were inappropriate, his acts fall short of the level of either severe or pervasive conduct sufficient to alter the terms or conditions of Moore's employment. Moore alleged only one instance of physical contact, and none of Taylor's acts were physically threatening or humiliating. Although some of Taylor's alleged comments were offensive, Title VII is not a "general civility code." *Faragher*, 118 S. Ct. at 2283-84.

Also nothing indicates that Taylor's conduct unreasonably interfered with Moore's job performance. Although

she claims that she suffered from lack of concentration and did not work as much overtime as she otherwise would have, she did continue to work at least some overtime; and there is no indication that her work suffered. She continued to receive good reviews at work, received bonuses, and did not receive negative comments or reprimands from her supervisors. The district court properly determined that Moore had failed to establish an adequate basis to support a finding that Taylor's acts were sufficiently severe to alter the terms or conditions of her employment so as to create an objectively hostile work environment.

III. CONCLUSION

Because the district court properly determined that Moore failed to establish a record to avoid summary judgment for defendant on her claim that TPA subjected her to a sexually hostile work environment or retaliated against for her reporting the harassment, we AFFIRM.

AFFIRMED.

United States Court of Appeals
For the Eleventh Circuit

No. 00-16521

District Court Docket No.
99-01901-CV-RLV-1

MIGNON MOORE,

Plaintiff-Appellant

Versus

TRAVIS PRUITT & ASSOCIATES, P.C.,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Georgia

JUDGMENT

It is hereby ordered, adjudged and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: August 10, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MIGNON MOORE, Plaintiff, v. TRAVIS PRUITT & ASSOCIATES, P.C., Defendant	CIVIL ACTION FILE NO. 1:99-CV-1901-RLV

FINAL REPORT AND RECOMMENDATION

(Filed Aug. 03, 2000)

Plaintiff Mignon Moore originally filed this employment discrimination action against Defendant Travis Pruitt & Associates, P.C., in the Superior Court of Gwinnett County, Georgia, on June 22, 1999. [Doc. 1]. On July 23, 1999, the action was removed to this court. [*Id.*] Plaintiff argues that Defendant violated Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e, *et seq.*, by subjecting her to a sexually hostile work environment and by retaliating against her. [Id.]. Plaintiff also asserts state law claims of negligent hiring and negligent retention. Defendant has filed a Motion [Doc. 25] for Summary Judgment and Plaintiff has filed a Motion [Doc. 26] for Partial Summary Judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure on Plaintiff's claims based upon the pleadings, statements of material facts, exhibits, and discovery materials submitted by the parties.

I. Background Facts

When evaluating the merits of a motion for summary judgment, the court must view the evidence and factual inferences in a light most favorable to the nonmoving party. *See Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529 (11th Cir. 1987). However, unsupported self-serving statements by the party opposing summary judgment are insufficient to avoid summary judgment. *See Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 714 (11th Cir. 1984). Therefore, the evidence presented by the parties having been evaluated in accordance with the foregoing principles, the following facts are deemed to be true for the limited purpose of evaluating Defendant's Motion [Doc. 25] for Summary Judgment and Plaintiff's Motion [Doc. 26] for Partial Summary Judgment.

Defendant Travis Pruitt & Associates, P.C. ("TPA") provides services in consulting, civil engineering, surveying and landscape architecture. [Defendant's Statement of Material Facts ("Def. SMF") ¶ 1]. TPA has between (80) and ninety (90) employees. [Plaintiff's ("Pla.") SMF ¶ 3]. Travis Pruitt, Sr., is the President of TPA. [Pla. SMF ¶ 2].

Plaintiff Mignon Moore was hired by TPA in March 1993 as a Computer Aided Drafting ("CAD") Technician. [Def. SMF ¶ 2]. Michael Taylor was hired by TPA to work as a CAD technician on or about June 19, 1996. [Pla. SMF ¶ 5]. Shortly after beginning work at TPA, Taylor told Plaintiff "on a regular basis" that she was beautiful. [Pla. Deposition ("Dep."), p. 99]. Plaintiff asked Taylor not to make such comments. [Pla. SMF ¶ 6]. During this same time period, around the fall of 1996, Plaintiff also talked to her immediate supervisor, Andy Belflower, about Taylor

calling her beautiful. [Pla. Dep., pp. 100-02]. Although Plaintiff testified that Taylor's statements made her uncomfortable, she and Taylor became friends. [Pla. Dep., pp. 100-01; Pla. SMF ¶ 6]. Plaintiff claimed that she told Belflower about Taylor's continued contacts with her. [Pla. Dep., pp. 102, 123-24]. Belflower testified that he and Plaintiff were friends and spoke together quite often. [Belflower Dep., p. 7]. However, he was not aware of Plaintiff's complaints of Taylor's alleged sexual harassment until after Plaintiff spoke with Travis Pruitt, Sr., in March of 1998. [Belflower Dep., pp. 7-8; Pla. SMF ¶ 11].

Plaintiff and Taylor talked to one another about their personal lives, went to lunch together with groups from work, and rode to some company softball games with another employee. [Def. SMF ¶ 4]. Plaintiff claims that Taylor called her at home and at her desk several times and made what she believed were inappropriate comments. [Pla. Dep., p. 102]. It is not clear, however, when most of these comments were made. Plaintiff testified that on one occasion, Taylor called her at home and told her that "the dress [she] wore that day looked really good on [her] and it really showed off [her] butt." [Pla. Dep., p. 102]. Taylor also asked Plaintiff if he could go skating with her, repeatedly asked her to lunch, and invited her to the movies. [Pla. Dep., pp. 104-06]. On one occasion, in response to Plaintiff's denial of Taylor's invitation to the movies, Taylor called her a "bitch." [Pla. Dep., p. 155]. That same day, Taylor waited in his car for three (3) or four (4) hours for Plaintiff to leave work. He followed her in his car, handed her a half dozen roses while she was sitting in traffic, and told her to meet him in a nearby "QuikTrip" parking lot. [Pla. Dep., pp. 155-56].

On another occasion, when a group of TPA employees had gone to lunch, Taylor asked Plaintiff, "Would you like to show us how to eat a peter?" [Pla. Dep., p. 109]. Plaintiff testified that on the same day, Taylor "touched me with a coat hanger on my butt." [Pla. Dep., p. 121]. Taylor asked Plaintiff if she would go to Hawaii and stay in a hotel with him, and once called her at home and informed her that he had heard she used to be a stripper. [Pla. Dep., pp. 115-16]. Taylor frequently contacted Plaintiff by notes, cards, and e-mail. [Def. SMF ¶ 6]. Plaintiff testified that she found many of these to be inappropriate. [Pla. Resp. to Def. SMF ¶ 6].

In the fall of 1997, when Plaintiff was going through a divorce, Plaintiff and Taylor had several conversations about personal issues. [Def. SMF ¶ 5]. On or about February 24, 1998, Taylor called Plaintiff at home while her boyfriend was there. [Def. SMF ¶ 8]. Plaintiff told Taylor not to call her anymore. [Pla. Resp. to Def. SMF ¶ 8]. The next day, February 25, 1998, Plaintiff and Taylor had an argument via e-mail about whether one of them should drop off of the softball team. [Doc. 26, Ex. A]. Plaintiff complained to Travis Pruitt, Sr., TPA's President, on or about March 5, 1998, about Taylor's behavior. [Pla. SMF ¶ 11; Def. SMF ¶ 11]. Plaintiff contends that she told Pruitt that Taylor was sexually harassing her and that she wanted him reprimanded, but that she did not want Taylor to lose his job. [Pla. SMF ¶ 12; Def. SMF ¶ 14]. Plaintiff also gave Pruitt some of the notes and cards Taylor had written her. [Pla. SMF ¶ 12].

Plaintiff testified that Pruitt told her that she and Taylor were not to have any more communication with each other except through their supervisor. [Pla. Dep., p.

126-27]. Plaintiff also testified that Pruitt told her to inform him or Pete Smith immediately if she had any problems with Taylor or anyone else. [Pla. Dep., p. 127]. On March 9, 1998, Pruitt gave Taylor a letter instructing him not to contact Plaintiff and warning him that if he did, his employment would be terminated. [Pla. Resp. to Def. SMF ¶ 17]. Plaintiff also received a letter on March 9, 1998, [Def. SMF ¶ 18]. The letter acknowledged Plaintiff's complaints, reassured her that TPA did not tolerate or condone any form of harassment, and informed her that she and Taylor were to have no further contact with one another. [Pla. Resp. to Def. SMF ¶ 19].

In April 1998, Plaintiff complained to Pete Smith that she thought Taylor had left an unsigned note on her desk. [Pla. Resp. to Def. SMF ¶ 21]. The note was a loose yellow "post-it" note that stated, "It's not that bad – after all." [Def. SMF ¶ 22]. Smith testified that he questioned Taylor about the note, but Taylor denied having written it. [Def. SMF ¶ 23]. Although Smith found "strong similarities" between the handwriting on the note and Taylor's handwriting, he decided not to take any action against Taylor at that time because he felt he could not conclusively determine whether Taylor had written the note. [Smith Dep., pp. 14-16].

In or about June 1998, Plaintiff told Smith that she wanted to transfer to the engineering side of TPA. [Def. SMF ¶ 24]. Michael Taylor was one of the employees on the "engineering side" of TPA. [Pla. Resp. to Def. SMF ¶ 25]. About the same time, Plaintiff spoke to Smith and asked if the company would allow her to speak with Taylor because "there was a definite need for the ban to be lifted for business purposes only." [Pla. Resp. to Def. SMF ¶ 26;

Pla. Dep., p. 132]. Smith asked Pruitt to approve a letter that would "drop the communication ban." [Pruitt Dep., p. 42]. Pruitt told Smith that he was not ready to lift the communication ban because "Mike and Mignon had no need to communicate. They didn't work on the same projects. They didn't work with the same people." [Pruitt Dep., p. 43].

On July 2, 1998, Taylor sent an e-mail to Plaintiff from Jon Stephenson's desk which stated, "Hope you've got a sweet tooth today. There's a donut in your file cabinet. Me. Don't reply." [Def. SMF ¶ 27]. On July 7, 1998, Taylor sent Plaintiff an e-mail from Andrew Blakey's computer which stated, "It's a total shame!!! Me. Don't reply I'm leaving. Bye." [Def. SMF ¶ 28]. On July 8, 1998, Taylor sent Plaintiff another e-mail, this time from Tonya Reynolds' desk, which stated, "Check file cabinet. Me."[1] [Def. SMF ¶ 29].

According to Plaintiff, on August 19 or 20, 1998, Taylor continued to bother her. [Pla. Dep., pp. 133-35]. Plaintiff testified that Taylor motioned for Plaintiff to call him, walked by her desk several times, glared at her, whispered for her to call him, and attempted to call her at her desk. [Pla. Dep., pp. 133-36]. Plaintiff testified that she finally responded by throwing her arms up in the air and saying to Taylor, "Leave me alone." [Pla. Dep., p. 135]. That same day, Plaintiff complained to Pruitt and informed him that Taylor continued to contact her. [Pla.

---

[1] Although she could not provide details, Plaintiff claims she reported these and other contacts by Taylor to Smith. [Pla. Dep., p. 129].

SMF ¶ 20; Pla. Dep., pp. 139-40]. Plaintiff showed Pruitt all the e-mails and letters she had in her possession and asked that Taylor be fired. [Pla. SMF ¶ 20]. Pruitt told Plaintiff that he would take care of the situation. [Def. SMF ¶ 34]. Plaintiff expressed her concern with losing her job, but, according to Plaintiff, Pruitt assured her that she would not lose her job. [Pla. Resp. to Def. SMF ¶¶ 33, 34].

On August 21, 1998, Taylor's employment with TPA was terminated. [Taylor Dep., p. 43]. Pruitt testified that Taylor was fired because "he had contacted Mignon and he had been told not to do that or his job was in jeopardy, and I fired him." [Pruitt Dep., p. 56]. Pruitt made the decision to fire Taylor. [Pruitt Dep., p. 56]. Taylor testified that upon being notified of his termination, he asked, "May I quit?" and was told that he could. [Taylor Dep., p. 47]. Around the same time, Pruitt made the decision to fire Plaintiff. [Pruitt Dep., p. 56]. Pruitt testified that during his last meeting with Plaintiff, she told him that "she had gone to a place where she was in clear view of Mike Taylor and she had gestured at him and had issued some statement to him. And that was not what she was supposed to do." [Pruitt Dep., p. 57]. For this reason, Pruitt terminated Plaintiff's employment with TPA. [Pruitt Dep., pp. 56-57].

TPA acknowledges that it did not have a written sexual harassment policy during the relevant periods of time. [Pla. SMF ¶ 8]. TPA also acknowledges that it did not provide training on sexual harassment. [Pla. SMF ¶ 9].

Additional facts will be set forth below as they become necessary for discussion of Plaintiff's claims.

II. Summary Judgment Standard

The court should grant a motion for summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56. The movant carries his burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). The nonmovant is then required "to go beyond the pleadings" and present competent evidence in the form of affidavits, depositions, admissions and the like, designating "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553. Generally, "[t]he mere existence of a scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202 (1986). Resolving all doubts in favor of the nonmoving party, the court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Id.*

"In an employment discrimination case, the plaintiff must produce sufficient evidence to support an inference that the defendant-employer based its employment decision on an illegal criterion." *Benson v. Tocco, Inc.*, 113 F.3d 1203, 1207 (11th Cir. 1997). Summary judgment in favor of the defendant-employer is proper unless the

plaintiff puts forth sufficient evidence to allow a fact finder to disbelieve each of employer's proffered explanations for its actions. *See id.* (citing *Combs v. Plantation Patterns*, 106 F.3d 1519, 1532 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045, 118 S. Ct. 685, 139 L. Ed. 2d 632 (1998)). While the Eleventh Circuit has stated that "in general, summary judgment is an inappropriate tool for resolving claims of employment discrimination," *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987), subsequent decisions "have weakened this broad proposition, concluding that 'despite the general presumption against using summary judgment to resolve the largely factual questions concerning discriminatory intent, it is possible for the defendant to present such strong evidence of a nondiscriminatory rationale that summary judgment is warranted.'" *Cross v. Southwest Recreational Industries, Inc.*, 17 F. Supp. 2d 1362, 1367 (N.D. Ga. 1998) (quoting *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 950 (11th Cir. 1991)).

III. Discussion

In a circumstantial evidence case, such as that herein, the allocation of burdens and order of presentation of proof are governed by the familiar *McDonnell Douglas* framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804, 93 S. Ct. 1817, 1824-25, 36 L. Ed. 2d 668 (1973). First, the plaintiff has the burden of proving a *prima facie* case of discrimination. If the plaintiff establishes a *prima facie* case, the court will presume discriminatory intent and the burden (of production) then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the action taken against the employee. If

the defendant carries this burden, the presumption of discrimination is eliminated, and the plaintiff has an opportunity to show that the legitimate reason offered by the defendant was a pretext for discrimination. *See id.*; *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 642-643 (11th Cir. 1998).

A. Plaintiff's Hostile Work Environment Claim

Plaintiff contends that Defendant TPA subjected her to a sexually hostile work environment. Hostile work environment sexual harassment occurs "when an employer's conduct 'has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive environment.'" *Steele v. Offshore Shipbuilding*, 867 F.2d 1311, 1315 (11th Cir. 1989) (quoting *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 2404-05, 91 L. Ed. 2d 49 (1986)). To establish a *prima facie* case of hostile work environment sexual harassment, Plaintiff must show: 1) that she belongs to a protected group; 2) that she was subjected to unwelcome sexual harassment; 3) that the harassment complained of was based upon her sex; 4) that the harassment affected a term, condition or privilege of employment; and 5) a basis for holding the employer liable. *See Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982). Because Plaintiff is a woman and was subjected to sexual comments and actions about

which she complained, the only elements in question are the last two (2).[2]

For sexual harassment to be actionable under Title VII, it "must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher v. City of Boca Raton*, 524 U.S. 775, 787, 118 S. Ct. 2275, 2283, 141 L. Ed. 2d 662 (1998). In determining whether the complained of sexual harassment was objectively offensive enough to affect a term, condition or privilege of employment, courts are to look at all the circumstances, including the frequency and severity of the conduct. *See id.* Courts should also determine whether the conduct was "physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfere[d] with an employee's work performance." *Id.* The Supreme Court has made it clear that Title VII is not a "general civility code." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S. Ct. 998, 1000-02, 140 L. Ed. 2d 201 (1998). "'[S]imple teasing', offhand comments, and isolated incidents (unless extremely serious)" normally will not amount to a hostile work environment.

---

[2] Defendant TPA contends that Plaintiff's language and actions show that Taylor's conduct was not unwelcome. [Doc. 25, pp. 8-9]. As Plaintiff correctly points out, however, the fact that she complained about Taylor's conduct shortly after it occurred shows that his conduct was unwelcome. *See Weinsheimer v. Rockwell International Corp.*, 754 F. Supp. 1559, 1564 (M.D. Fla. 1990), *aff'd*, 949 F.2d 1162 (11th Cir. 1991). Plaintiff's language and actions are relevant, however, to another issue: whether Plaintiff actually perceived Taylor's conduct as hostile or abusive, discussed *infra*. *See Balletti v. Sun-Sentinel Co.*, 909 F. Supp. 1539, 1546 (S.D. Fla. 1995) (recognizing that "[w]hether a plaintiff subjectively perceived her work environment as abusive is closely related to another element of her claim – whether she welcomed the conduct.")

Faragher, 524 U.S. at 788, 118 S. Ct. at 2283 (citations omitted).

In the present case, Taylor's actions, as alleged by Plaintiff, consisted of the following: saying he had heard that Plaintiff used to be a stripper; asking her, "Would you like to show us how to eat a peter?"; calling her a "bitch"; touching her "with a coat hanger on [her] butt"; frequently complimenting Plaintiff on her appearance, frequently contacting her by phone, notes, and e-mail; and asking her to accompany him on various occasions. While Taylor's actions and language were undoubtedly inappropriate and crude, they were not sufficiently severe to alter the terms of conditions of Plaintiff's employment. "First and most importantly, [Plaintiff] did not present evidence that [Taylor's] conduct was 'physically threatening or humiliating' or that the cumulative effect of this conduct 'unreasonably interfered' with [Plaintiff's] job performance." *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1248 (11th Cir. 1999) (citations omitted). Plaintiff was neither threatened nor humiliated by Taylor, and by her own testimony, she continued to perform her job well until she was terminated. [Pla. Resp. to Def. SMF ¶ 39; Pla. Dep., pp. 44-45]. With the exception of the coat hanger incident, Plaintiff does not allege that Taylor touched her. [Pla. Dep., p. 121]. Moreover, while Plaintiff and Taylor had several conversations about personal issues, he never told her that he was interested in a sexual relationship with her. [Pla. Dep., p. 115]. Based on these facts, and in light of the standard for actionable sexual harassment as recently expressed by the Eleventh Circuit in *Mendoza v. Borden, Inc.*, the court finds that Taylor's conduct did not create an objectively hostile work environment. *See Mendoza*, 195 F.3d at 1246-47 (citing, e.g., *Black v. Zaring Homes, Inc.*, 104 F.3d 822,

823-24 (6th Cir. 1997) (reversing jury verdict and finding insufficiently severe conduct involving repeated sexual jokes; one occasion of looking plaintiff up and down, smiling and stating, there's "Nothing I like more in the morning than sticky buns"; suggesting land area be named as "Titsville" or "Twin Peaks"; asking plaintiff, "Say, weren't you there [at a biker bar] Saturday night dancing on the tables?"; stating, "Just get the broad to sign it"); *Weiss v. Coca-Cola Bottling Co. of Chicago*, 990 F.2d 333, 337 (7th Cir. 1993) (holding plaintiff's claim did "not meet the standard for actionable sexual harassment," despite her allegations that supervisor "asked her for dates, called her a 'dumb blond,' put his hand on her shoulder several times, placed 'I love you' signs in her work area and attempted to kiss her [once] in a bar" and twice at work)).

The court also finds that Plaintiff has failed to create a genuine issue of fact on whether she perceived the conduct to be hostile or abusive. *See Faragher*, 524 U.S. at 787, 118 S. Ct. at 2283. Although Plaintiff contends that she found many of Taylor's comments offensive [Pla. Dep., p. 109], Taylor testified that Plaintiff often used sexually charged language herself. For example, Taylor stated "[Plaintiff] said that . . . if some guy – some girl broke up with a guy, she broke up because he had a little dick." [Taylor Dep., p. 137]. Also, according to Taylor, "Anybody at that office had a bad mood, if you said, 'What's wrong?' [Plaintiff] said they needed a good fuck." [Taylor Dep., p. 137]. When questioned about this, Plaintiff responded, "I may have made that statement. It was more likely for me to say that somebody needs to get laid." [Plaintiff Dep., p. 111]. Plaintiff acknowledged that she "used the 'F' word in the workplace." [Plaintiff Dep., p. 111]. In addition, Taylor

testified that while playing softball, "if [Plaintiff] had a bat, she'd sit it down by my feet and toss it to where it would hit me between the legs." [Taylor Dep., p. 138].

Plaintiff correctly points out that the "use of foul language or sexual innuendo in a consensual setting" does not waive a plaintiff's legal protections against unwelcome harassment. *Morgan v. Fellini's Pizza, Inc.*, 64 F. Supp. 2d 1304, 1309-10 (N.D. Ga. 1999). However, a plaintiff's use of vulgar and sexually charged language clearly goes to the issue of whether she perceived the alleged harasser's actions and language to be hostile or abusive. *See Faragher*, 524 U.S. at 787, 118 S. Ct. at 2283; *Meritor*, 477 U.S. at 69, 106 S. Ct. at 2406. A person who uses the type of language Plaintiff has acknowledged using cannot reasonably claim that she found the use of similar language abusive. Because a reasonable jury could not find that the harassment complained of affected a term, condition or privilege of Plaintiff's employment, the undersigned **RECOMMENDS** that Defendant TPA's summary judgment motion [Doc. 25] be **GRANTED** on Plaintiff's hostile work environment claim.

Assuming *arguendo* that Plaintiff had been able to establish the "severity" element of a *prima facie* case of hostile work environment, the court's recommendation would not change. This is because Plaintiff has also failed to show that there is a basis for holding Defendant TPA liable. *See Henson*, 682 F.2d at 905. When the alleged harasser is the plaintiff's co-worker rather than her supervisor, as in the present case, the plaintiff must show that the defendant employer 1) had adequate notice of the harassment and 2) failed to take "adequate remedial steps to abate it." *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361,

1364 (11th Cir. 1999) (per curiam), *vacating* 160 F.3d 688 (11th Cir. 1998); *accord Henson*, 682 F.2d at 905.

"The employee can show that the employer had knowledge of the harassment by proving that she complained to higher management of the problem or by demonstrating that the harassment was so pervasive that an inference of constructive knowledge arises." *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir 1988). Plaintiff does not contend that an inference of constructive knowledge arose; rather, she claims that Defendant TPA had notice of the harassment when she complained to her immediate supervisor, Andy Belflower. In or around the fall of 1996, Plaintiff informed Belflower that Taylor had called her beautiful. [Pla. Dep., pp. 100-02]. Plaintiff contends that she spoke with Belflower about Taylor on other occasions, but she is unable to say when [Pla. Dep., pp. 123-24]. Plaintiff argues that this conversation with Belflower was sufficient to put TPA on notice of Taylor's harassment.

There are at least two (2) reasons why the court finds Plaintiff's argument unpersuasive. First, it is unclear whether Plaintiff complained to Belflower of sexual harassment. Plaintiff stated that she told Belflower that Taylor was calling her beautiful, but, as far as the court can tell, Plaintiff has not offered evidence of the substance of any of her other alleged complaints. [Pla. Dep., pp. 123-24]. Given Belflower's uncontroverted testimony that he and Plaintiff were friends and often spoke together [Belflower Dep., p. 7], Plaintiff's complaints of being called beautiful were not sufficient to put Defendant TPA on notice that she was being sexually harassed. *See Coates*, 164 F.3d at 1364-65.

Second, because Taylor was a co-worker, for Plaintiff to show that TPA "had knowledge of the harassment," Plaintiff must show that she complained to "higher management." *Huddleston*, 845 F.2d at 904. Plaintiff did not complain to "higher management" until she approached Travis Pruitt, Sr., TPA's President, in March of 1998. [Pla. SMF ¶ 11; Def. SMF ¶ 11]. At that time, Plaintiff told Pruitt that Taylor was sexually harassing her and that she wanted him reprimanded. [Pla. SMF ¶ 12; Def. SMF ¶ 14]. Immediately upon hearing this, Pruitt informed Plaintiff that she and Taylor were not to have any more communication with each other except through their supervisor. [Pla. Dep., p. 126-27]. A few days later, Pruitt gave Taylor a letter instructing him not to contact Plaintiff and warning him that if he did, his employment would be terminated. [Pla. Resp. to Def. SMF ¶ 17]. Plaintiff was also warned in writing not to have any other contact with Taylor. [Pla. Resp. to Def. SMF ¶ 19]. When it was reported to Pruitt in August of 1998 that Plaintiff and Taylor had been in contact with one another, Pruitt made the decision to fire both of them. [Pruitt Dep., pp. 56-57]. Based on these facts, the court finds that Plaintiff has not shown that Defendant TPA failed to take "adequate remedial steps to abate" the alleged harassment after Plaintiff notified Pruitt of the problem. *See Coates*, 164 F.3d at 1364. The court next turns to Plaintiff's retaliation claim.

B. Plaintiff's Retaliation Claim

Plaintiff Moore contends that Defendant TPA retaliated against her when it terminated her employment. [Doc. 26, p. 4]. Title VII acts to shield employees from

retaliation for certain protected practices. Specifically, the statute provides, in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). The *McDonnell Douglas* framework applies to retaliation cases. *See Holifield v. Reno*, 115 F.3d 1555, 1566 (11th Cir. 1997); *Robinson v. AFA Service Corp.*, 870 F. Supp. 1077, 1083 (N.D. Ga. 1994). The burden of production is initially on the plaintiff, who must prove a *prima facie* case of retaliation by a preponderance of the evidence. To establish a *prima facie* case of retaliation, "a plaintiff must show that (1) she engaged in statutorily protected expression; (2) she suffered an adverse employment action; and (3) the adverse action was causally related to the protected expression." *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1454 (11th Cir. 1998). The plaintiff "'need not prove the underlying claim of discrimination which led to [her] protest,' however, the plaintiff must have had a reasonable good faith belief that the discrimination existed." *Holifield*, 115 F.3d at 1566 (citing *Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491, 1494 (11th Cir. 1989)).

Plaintiff informed Travis Pruitt, Sr., on or about March 5, 1998, that Michael Taylor was sexually harassing her. [Pla. SMF ¶¶ 11, 12; Def. SMF ¶ 14]. This is sufficient to satisfy the first *prima facie* element. Because Plaintiff was fired in late August of 1998, she has also

satisfied the second element. The remaining element requires Plaintiff to show that her termination was "causally related to the protected expression." *Wideman*, 141 F.3d at 1454.

When determining whether a causal link exists, the court is essentially looking to see if any inference of retaliation can be drawn from the circumstances surrounding the employer's action. *See Morgan v. City of Jasper*, 959 F.2d 1542, 1547 (11th Cir. 1992) ("To establish the causal connection between her protected activity and the adverse employment action, Morgan had to demonstrate that defendant was discriminatorily motivated, which she could do by circumstantial evidence."). It is important to note that "this circuit interprets the causation requirement broadly; 'a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated.'" *Robinson*, 870 F. Supp. at 1083 (citing *EEOC v. Reichold Chems., Inc.*, 988 F.2d 1564, 1571 (11th Cir. 1993)). *See also Olmsted v. Taco Bell Corp.*, 141 F.3d 1457, 1460 (11th Cir. 1998).

If an employer was aware of an employee's protected expression and the adverse employment action taken against the employee occurred shortly after the expression, then the short amount of time between the two (2) events, standing alone, may be enough to produce an inference of retaliation. *See Balletti*, 909 F. Supp. at 1549 (citing *Balicao v. Univ. of Minnesota*, 737 F.2d 747 (8th Cir. 1984)). "The shorter the period between the two events, the stronger the inference that the adverse action was improperly motivated." *Id.* Conversely, the longer the period between the protected activity and the adverse employment action, the weaker the inference that the adverse action was motivated by retaliation. *See, e.g.,*

Maniccia v. Brown, 171 F.3d 1364, 1369 (11th Cir. 1999) (holding that fifteen (15) months between grievance and alleged adverse employment action was insufficient to establish causal connection); *Leslie v. Mobile Transit Authority*, 963 F. Supp. 1142, 1149 (S.D. Ala. 1997) (holding that absent additional evidence, a year between the protected activity and the discharge was not temporally close enough to support an inference of causal connection); *Breech v. Alabama Power Co.*, 962 F. Supp. 1447, 1461 (S.D. Ala. 1997) (same); *Balleti*, 909 F. Supp. at 1549 (holding that elapse of six (6) months between grievance and discharge did not permit inference of causal connection).

In the present case, over five (5) months elapsed between Plaintiff's protected expression and her termination. Plaintiff argues, however, that her complaint to Pruitt on August 19 or 20, 1998, was protected expression. She also contends that her act of throwing her arms up in the air and telling Taylor to leave her alone was "in itself a complaint of sexual harassment." [Doc. 26, p. 8]. The behavior Plaintiff complained about consisted of the following: "Mr. Taylor . . . motioned for me to call him, . . . walked by my desk . . . always glaring at me . . . whispering to me to call him at his desk. . . . If I got up from my desk, he would be at least no more than . . . five steps behind me. . . . " [Pla. Dep., p. 134]. The problem with Plaintiff's argument is that when Plaintiff yelled at Taylor and then complained to Pruitt, she was complaining about Taylor's attempts to contact her, which were in violation of the "communications ban" established by Pruitt. [Pla. Dep., pp. 134-35]. Plaintiff was not, however, complaining about sexual harassment in August of 1998. Nevertheless, because the causation requirement is to be interpreted

broadly, the court will assume that some causal link existed between Plaintiff's complaint in early March and her termination in late August of 1998. *See Reichold Chems, Inc.*, 988 F.2d at 1571. Plaintiff is able to establish a *prima facie* case of retaliation.

The burden of production then shifts to Defendant to articulate some legitimate, non-discriminatory reason for the action taken against Plaintiff. *See Combs*, 106 F. 3d at 1528 (citing *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824; *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 1094, 67 L. Ed. 2d 207 (1981). To satisfy its burden of production, "the defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Id.* (quoting *Burdine*, 450 U.S. at 454-55, 101 S. Ct. at 1094). "[T]o satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Id.* (quoting *Burdine*, 450 U.S. at 257, 101 S. Ct. at 1096). The defendant's burden in the rebuttal stage is "exceedingly light." *Walker v. NationsBank of Florida*, 53 F.3d 1548, 1556 (11th Cir. 1995); *Perryman v. Johnson Prods. Co.*, 698 F.2d 1138, 1142 (11th Cir. 1983).

Plaintiff asserts that "TPA offers no non-discriminating reason for discharging Ms. Moore." [Doc. 26, p. 7]. It is clear, however, that this assertion is incorrect. The President of TPA, Travis Pruitt, Sr., testified that he made the decision to fire Plaintiff because she admitted that she had communicated with Taylor after she had been instructed not to do so. [Pruitt Dep., p.

56; Doc. 26, p. 8]. Although Plaintiff claims that "Mr. Pruitt testified that it was because of . . . [Plaintiff's] final complaint that Mignon Moore was terminated," this is a misrepresentation of Pruitt's testimony. [Doc. 26, p. 7]. By asserting that Plaintiff was fired because she did not abide by the "communications ban" established by Pruitt, Defendant TPA has offered a legitimate, non-discriminatory reason for the action taken.

Once a defendant meets its burden of production, "the presumption of discrimination created by the McDonnell Douglas framework 'drops from the case,' and 'the factual inquiry proceeds to a new level of specificity.'" *Combs*, 106 F.3d at 1528 (quoting *Burdine*, 450 U.S. at 255 & n.10, 101 S. Ct. at 1094-95 & n.10). The plaintiff then "has the opportunity to demonstrate that the defendant's articulated reason for the adverse employment action is a mere pretext for discrimination." *Holifield*, 115 F.3d at 1565 (citing *McDonnell Douglas*, 411 U.S. at 804, 93 S. Ct. at 1825.) Plaintiff's proof of pretext merges with her "ultimate burden of showing that the defendant intentionally discriminated against the plaintiff." *Id.* (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 113 S. Ct. 2742, 2749, 125 L. Ed. 2d 407 (1993)). This task is a highly focused one.

The court "must, in view of all the evidence, determine whether the plaintiff has cast sufficient doubt on the defendant's proffered nondiscriminatory reasons to permit a reasonable fact finder to conclude that the employer's proffered 'legitimate reasons were not what actually motivated its conduct.'" *Combs*, 106 F.3d at 1538 (quoting *Cooper-Houston v. Southern Ry. Co.*, 37 F.3d 603, 605 (11th Cir. 1994)). The court's task is to "evaluate whether

the plaintiff has demonstrated 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could find them unworthy of credence.'" *Id.* (quoting *Sheridan v. E.I. DuPont De Nemours & Co.*, 100 F.3d 1061, 1072 (3rd Cir. 1996) (en banc), *cert. denied*, 521 U.S. 1129, 117 S. Ct. 2532, 138 L. Ed. 2d 1031 (1997)). "[A] plaintiff may not in all cases merely rest on the laurels of her *prima facie* case in the face of powerful justification evidence offered by the defendant." *Grigsby*, 821 F.2d at 596. Plaintiff can either directly persuade the court that a discriminatory reason more likely motivated the employer or show indirectly that the employer's proffered explanation is unworthy of credence. *See Miles v. M.N.C. Corp.*, 750 F.2d 867, 870-71 n.4 (11th Cir. 1985).

In the present case, although Plaintiff is required to show that Defendant's stated reason was not "what actually motivated its conduct," Plaintiff acknowledges that Defendant's reason for firing Plaintiff, as stated by Pruitt, was the true reason. *Combs*, 106 F.3d at 1538. Plaintiff argues, however, that this reason was a discriminatory one because, according to Plaintiff, Pruitt admitted that he retaliated against Plaintiff. [Doc. 26, p. 7]. As discussed previously, Plaintiff misstates Pruitt's testimony. Pruitt did not testify that he fired Plaintiff because she complained of sexual harassment but because she communicated with Taylor. [Pruitt Dep., p. 56].

Plaintiff also argues pretext by pointing out that in response to Plaintiff's complaints about Taylor, Pruitt ordered both Taylor and Plaintiff not to speak to each other. [Doc. 26, p. 7]. Apparently Plaintiff contends that being instructed not to interact with Taylor was itself an

adverse employment action. According to Plaintiff, she was punished as a result of her complaint because she and Taylor received the same treatment and because Pruitt testified that he considered the communications ban to be a form of punishment against Taylor. [*Id.*]. Thus, so goes the thinking, Pruitt essentially admitted that he retaliated against Plaintiff for her sexual harassment complaint by forbidding her from communicating with Taylor. The court finds this argument unpersuasive.

Plaintiff's contention that she was "punished" by Pruitt's order banning all communication between herself and Taylor is illogical. Plaintiff complained to Pruitt that Taylor was harassing her by sending her e-mails, calling her and speaking to her. [Pla. Dep., p. 125]. Pruitt apparently attempted to remedy the situation by forbidding any communication between Taylor and Plaintiff. Now, Plaintiff contends that by this act, Pruitt was punishing her. While the court understands how the communications ban against Taylor could be considered some form of punishment (given his desire, as alleged by Plaintiff, to communicate with Plaintiff), it does not understand how Plaintiff could reasonably believe that she was being punished by being instructed not to communicate with Taylor. It seems inconceivable that a victim of sexual harassment would complain about less interaction with her harasser.

The court recognizes that Plaintiff may not have agreed with Pruitt's decision to impose the communications ban or with his decision to fire her. But this is not relevant to the court's pretextual inquiry. "Federal courts 'do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, no matter how high-handed its

decisional process, no matter how mistaken the firm's managers, the [law] does not interfere.'" *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (quoting *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988)). The relevant issues are whether Pruitt actually believed that Plaintiff had spoken to Taylor and whether this belief was the reason for her termination. If this was the case, pretext is not established, even if Pruitt was mistaken in his belief. *See Smith v. Papp Clinic, P.A.*, 808 F.2d 1449, 1452-53 (11th Cir. 1987). Moreover, it appears that Pruitt was not mistaken as Plaintiff acknowledges that she was told not to speak to Taylor and that she did, in fact, speak to Taylor when she said, "Leave me alone." [Pla. Dep., p. 135].

Based on these facts, the court finds that Plaintiff has failed to offer evidence sufficient to allow a reasonable jury to conclude that Defendant TPA's stated reason for firing her was a pretext of retaliation. The undersigned **RECOMMENDS** that Defendant's summary judgment motion [Doc. 25] be **GRANTED** and that Plaintiff's summary judgment motion [Doc. 26] be **DENIED** on Plaintiff's retaliation claim.

C. Plaintiff's State Law Claims of Negligent Hiring and Retention

Because the court recommends granting summary judgment on all of Plaintiff's federal claims, her only remaining claims are state law claims of negligent hiring and negligent retention. [Doc. 1]. Twenty-eight U.S.C. § 1367(c)(3) provides, in pertinent part, "The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . the district court

has dismissed all claims over which it has original jurisdiction. . . ." The court **RECOMMENDS** that supplemental jurisdiction not be exercised over Plaintiff's remaining state law claims and that they be dismissed without prejudice. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 1139, 16 L. Ed. 2d 218 (1966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.").

IV. Conclusion

For all the foregoing reasons and cited authority, the undersigned **RECOMMENDS** that Defendant's Motion [Doc. 25] for Summary Judgment be **GRANTED** with respect to all of Plaintiff's federal claims, that Plaintiff's state law claims be dismissed without prejudice, and that Plaintiff's Motion [Doc. 26] for Partial Summary Judgment be **DENIED**.

The Clerk is **DIRECTED** to terminate this reference.

SO RECOMMENDED, this 3rd day of AUGUST, 2000.

/s/ Janet F. King
JANET F. KING
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MIGNON MOORE, Plaintiff, v. TRAVIS PRUITT & ASSOCIATES, P.C., Defendant.	CIVIL ACTION NUMBER: 1:99-CV-1901-RLV

ORDER

After carefully considering the report and recommendation of the magistrate judge, together with the objections thereto, the court receives it with approval and adopts it as the opinion and order of this court.

So Ordered, this ___ day of November, 2000.

ROBERT L. VINING, JR.
Senior United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MIGNON MOORE, Plaintiff, v. TRAVIS PRUITT & ASSOCIATES, P.C., Defendant.	CIVIL ACTION NUMBER: 1:99-CV-1901-RLV

JUDGMENT

This action having come before the court, Honorable Robert L. Vining, Jr., United States District Judge, for consideration of defendant's motion for summary judgment, and the court having granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendant recover costs of this action, and the action be, and the same hereby, is **dismissed**.

Dated at Atlanta, Georgia, this 15th day of November, 2000.

LUTHER D. THOMAS
CLERK OF COURT

By: _____
Deputy Clerk

Prepared, Filed and Entered
In the Clerk's Office
November 15, 2000
Luther D. Thomas
Clerk of Court

By: _____
Deputy Clerk

United States Court of Appeals
For the Eleventh Circuit

No. 00-16521-AA

District Court Docket No.
99-01901-CV-RLV-1

MIGNON MOORE,

Plaintiff-Appellant

Versus

TRAVIS PRUIT & ASSOCIATES, P.C.,

Defendant-Appellee.

On Appeal from the United States District Court for the

For The Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion ___, 11th Cir., 19_, ___ F.2d ___).

Before: TJOFLAT, EDMONDSON and BLACK, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

[Dated February 21, 2002]

Supreme Court, U.S.
FILED
JUN 26 2002
CLERK

No. 01-1726

In The

Supreme Court of the United States

MIGNON MOORE,

Petitioner,

v.

TRAVIS PRUITT & ASSOCIATES, P.C.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARY ANN B. OAKLEY
Counsel of Record
C. ANDREW HEAD
HOLLAND & KNIGHT LLP
Suite 2000, One Atlantic Center
1201 West Peachtree Street, N.E.
Atlanta Georgia 30309-3400
(404) 817-8500

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING

The parties to this proceeding are set forth in the case caption.

TABLE OF CONTENTS

	Page
Parties to the Proceeding	i
Table of Contents	ii
Table of Authorities	iv
Statement of the Case	1
Reasons for Denying the Writ	3
I. Moore Failed To Establish That The Decision Of The Eleventh Circuit On Her Hostile Work Environment Claim Conflicts With The Decision Of A United States Court Of Appeals	3
A. The Courts In This Case Did Not Reach The Holding Moore Attributes To Them	4
B. The Fourth, Sixth, Eighth, Ninth and Eleventh Circuits Have Not Rejected The Reasonable Juror Standard In Determining The Sufficiency Of A Hostile Work Environment Claim On Motions For Summary Judgment As A Matter Of Law	6
II. The Ruling Below On Moore's Hostile Work Environment Claim Does Not Conflict With Existing Supreme Court Precedents	9
III. This Case Does Not Present A Split Of Circuit Authority As To Whether Rejection Of A Harasser's Advances Constitutes Protected Opposition Under Section 704(a) Of Title VII	10
A. The Eleventh Circuit Held That Moore Established A *Prima Facie* Case Of Protected Activity Under The Opposition Clause	10

TABLE OF CONTENTS – Continued

Page

B. There Is No Split Of Circuit Authority As To Whether A Statement To The Non-Supervisor Harasser Allegedly Rejecting His Advances Is Protected Opposition Under Section 704(a) 11

C. The Ruling Below On Moore's Complaint To Taylor Does Not Conflict With Existing Supreme Court Precedent 14

IV. The Decision Of The Eleventh Circuit May Be Upheld Because It Is Also Correct Under Other Standards 15

Conclusion 16

TABLE OF AUTHORITIES

Page

CASES:

Abeita v. Transamerica Mailings, Inc., 159 F.3d 246 (6th Cir. 1998) 7

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)..... 5

Beard v. Flying J, Inc., 266 F.3d 792 (8th Cir. 2001) 7

Breeding v. Arthur J. Gallagher and Co., 164 F.3d 1151 (8th Cir. 1999)..... 7

Burks v. California Highway Patrol, 2 Fed. Appx. 887, Nos. 99-56394, 99-56905, 2001 WL 80409 (9th Cir. 2001) 7

Carter v. Chrysler Corp., 173 F.3d 693 (8th Cir. 1999)..... 7

Dandridge v. Williams, 397 U.S. 471 (1970) 15

DeGrace v. Rumsfeld, 614 F.2d 796 (1st Cir. 1980) 12

Excel Corp. v. Bosley, 165 F.3d 635 (8th Cir. 1999).....12, 13

Faragher v. City of Boca Raton, 524 U.S. 775 (1998)....9, 15

Greene v. Dalton, 164 F.3d 671 (D.C. Cir. 1999)..... 8

Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir. 1999).....2, 8

Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269 (11th Cir. 2002)..... 8

Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc., 14 F.3d 1507 (11th Cir. 1994).....15

Ogden v. Wax Works, Inc., 214 F.3d 999 (8th Cir. 2000).....12

O'Shea v. Yellow Technology Servs., Inc., 185 F.3d 1093 (10th Cir. 1999)..... 7

TABLE OF AUTHORITIES – Continued

Page

Powers v. U.S., 996 F.2d 1121 (11th Cir. 1993).....15

Rucker v. Higher Educational Aids Bd., 669 F.2d 1179 (7th Cir. 1982).....12

Spriggs v. Diamond Auto Glass, 242 F.3d 179 (4th Cir. 2001)..... 6

U.S. Equal Employment Opportunity Comm. v. Massey Yardley Chrysler Plymouth, Inc., 117 F.3d 1244 (11th Cir. 1997)..... 8

U.S. v. Arthur Young and Co., 465 U.S. 805 (1984) 15

U.S. v. New York Tel. Co., 434 U.S. 159 (1977).....15

Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453 (11th Cir. 1998).....10

Williams v. General Motors Corp., 187 F.3d 553 (6th Cir. 1999)..... 7

STATUTES:

42 U.S.C. §1981a..... 2

42 U.S.C. §2000e-3(a) 10

OTHER:

H.R. REP. No. 102-40, pt. 2. 3

Herbert, Douglas C. and Lani Schweiker Shelton, *A Pragmatic Argument Against Applying the Disparate Impact Doctrine in Age Discrimination Cases*, 37 S. TEX. L. REV. 625 (1996)..... 2

STATEMENT OF THE CASE

The following facts were misstated or omitted by Petitioner Mignon Moore ("Moore") in her statement of facts:

This case involves a claim that Moore's co-worker, Michael Taylor, sexually harassed her. Taylor was not a supervisor, much less Moore's supervisor; in fact, Moore and Taylor did not work on the same projects, did not work with the same people, and had no work-related reason to communicate with each other.

On March 5, 1998, Moore complained to Travis Pruitt, Sr., President of Respondent Travis Pruitt & Associates, P.C. ("TPA"), that Taylor was harassing her. In response to that complaint, Pruitt told Moore that she and Taylor were not to have any further communications with each other except through their supervisor. Pruitt also told Moore to inform him or Pete Smith, another member of TPA management, if she had any problems with Taylor or any other employee. On March 9, 1998, Pruitt issued separate letters to Taylor and Moore, informing them that each person was to have no further contact with the other.

Moore testified that she subsequently communicated with Taylor when, in response to his attempts to communicate with her on August 19 or 20, 1998, she threw her arms up in the air and told Taylor, "Leave me alone." Pruitt terminated Taylor's employment as a result of his violation of the communication ban.

Moore told Pruitt during his last meeting with her that "she had gone to a place where she was in clear view of Mike Taylor and she had gestured at him and had issued some statement to him. And that was not what she

was supposed to do." Therefore, Pruitt also terminated Moore's employment for violation of the communication ban.

The district court properly found that Moore was not complaining about *sexual* harassment in August of 1998; rather, she was complaining to Taylor directly, and to Pruitt, that Taylor was violating the communication ban. There is no evidence in the record that any allegedly *sexual* harassment occurred after Pruitt instituted the communication ban, notwithstanding Moore's recitation of fact that "Michael Taylor began what would become a two year campaign of sexual harassment of Moore . . . [and TPA] failed to take effective action to end the harassment [prior to terminating Taylor and Moore]."[1]

Finally, Moore claims that "the provision for jury trials was the most contentious part of the 1991 Civil Rights Act," 42 U.S.C. §1981a, and "[i]t was the proposed authorization of jury trials in sex discrimination cases, that particularly divided members of Congress."[2] However, the legislative history of the Civil Rights Act of 1991 is limited, because most of the discussion that led to the compromise statute took place in closed door discussions between the White House and Congressional leaders. *See Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1278 (11th Cir. 1999) (Barkett, J. dissenting), *citing* Douglas C. Herbert & Lani Schweiker Shelton, *A Pragmatic Argument Against Applying the Disparate Impact Doctrine in Age Discrimination Cases*, 37 S. TEX. L. REV. 625, 652 n.147 (1996). The

---

[1] Moore's Petition for Writ of Certiorari ("Moore Cert. Pet."), p. 2.

[2] Moore Cert. Pet., p. 7.

House Judiciary Committee devoted only two paragraphs of its Judicial Committee Report to the 102nd Congress on May 17, 1991, to discussing the jury reform provision in the Act. H.R. REP. No. 102-40, pt. 2. The divisive issue concerning the Civil Rights Act of 1991 was the addition of compensatory and punitive damages, not jury trials.

REASONS FOR DENYING THE WRIT

I. Moore Failed To Establish That The Decision Of The Eleventh Circuit On Her Hostile Work Environment Claim Conflicts With The Decision Of A United States Court Of Appeals.

The Court should deny the Petition for Writ of Certiorari because no conflict exists among the circuits. Moore argues that the decision of the Court of Appeals for the Eleventh Circuit in this case[3] is in conflict with decisions of the First, Second, Third, and Seventh Circuits. This contention is merely an attempt to manufacture a conflict where none exists, because neither the Eleventh Circuit nor the other circuits cited as being in accord have adopted the holding that Moore attributes to them.

[3] Moore also contends that the Fourth, Sixth, Eighth, and Ninth Circuits apply the same rule of law allegedly followed by the Eleventh Circuit in this case by "rejecting" the reasonable juror standard in determining the existence of an objectively hostile work environment on summary judgment. Moore Cert. Pet., pp. 10-12.

A. The Courts In This Case Did Not Reach The Holding Moore Attributes To Them.

Moore alleges that in granting summary judgment to TPA in the instant case, the district judge[4] ruled that the alleged harassment was not sufficiently severe or pervasive to create an objectively hostile environment by resolving the claim on the merits himself, rather than determining whether a reasonable juror could find that the alleged harassment was objectively hostile. She bases this argument on the district court's statement that "the court finds that Taylor's conduct did not create an objectively hostile work environment."[5] Moore further alleges that the Eleventh Circuit in its *de novo* review similarly made its own determination of whether the alleged harassment was objectively hostile, rather than determining whether a reasonable juror could reach that conclusion, based on the following statement: "The district court properly determined that Taylor's conduct did not create an objectively hostile work environment."[6]

Neither the district court in this case nor the Eleventh Circuit substituted their independent judgment of whether the alleged harassment created an objectively hostile environment for a determination of whether a reasonable juror could find an objectively hostile environment. The district court stated at the outset that its determination on summary judgment is limited to the following:

---

[4] The district judge adopted the Magistrate Judge's Report and Recommendation.

[5] Moore Cert. Pet., App. 22a.

[6] Moore Cert. Pet., App. 8a.

> Resolving all doubts in favor of the nonmoving party, the court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." [*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)].[7]

The district court found that Moore failed to create a genuine issue of fact as to whether the conduct was objectively or subjectively hostile or abusive, and summarized its holding as follows:

> Because a reasonable jury could not find that the harassment complained of affected a term, condition or privilege of Plaintiff's employment, [the court grants summary judgment to TPA] on Plaintiff's hostile work environment claim.[8]

The Eleventh Circuit reached the same conclusion, holding that "[t]he district court properly determined that Moore had failed to establish an adequate basis to support a finding that Taylor's acts were sufficiently severe to alter the terms or conditions of her employment so as to create an objectively hostile work environment."[9]

Thus, Moore is essentially complaining that the underlying decisions in this case were poorly drafted, because the district court and Eleventh Circuit did not explicitly reiterate the "fair-minded jury" summary judgment standard before each of its "findings" so as to state the obvious: the court on summary judgment determines whether a reasonable jury could find for the non-movant

---

[7] Moore Cert. Pet. App. 18a.

[8] Moore Cert. Pet. App. 22a-24a.

[9] Moore Cert. Pet. App. 9a.

on the evidence presented, with all inferences resolved in favor of the non-movant. The district court stated this well-established standard at the outset, and repeated it in concluding that a reasonable juror could not find that the harassment complained of supported a hostile work environment claim. The Eleventh Circuit agreed with this result. Therefore, contrary to Moore's representation, the courts in this case did not reject a reasonable juror standard on summary judgment in favor of substituting their own independent judgment on the merits. This case simply does not present the issue Moore attributes to it in her Petition for Writ of Certiorari.

B. The Fourth, Sixth, Eighth, Ninth And Eleventh Circuits Have Not Rejected The Reasonable Juror Standard In Determining The Sufficiency Of A Hostile Work Environment Claim On Motions For Judgment As A Matter Of Law.

The opinions of the Fourth, Sixth, Eighth, and Ninth Circuits cited by Moore contain statements regarding the court's "findings" without further clarification of the basis for reaching each such finding. Moore misconstrues this omission to represent a radical departure from the reasonable juror standard on a motion for summary judgment regarding a hostile work environment harassment claim. As is evident from other decisions by these circuits resolving summary judgment motions on hostile work environment harassment claims, these circuits do not resolve such claims in the manner she contends. *See Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001) ("We are therefore satisfied that a reasonable jury examining the totality of the circumstances could find . . . that a

hostile work environment confronted Spriggs during his first term of employment with Diamond."); *Williams v. General Motors Corp.*, 187 F.3d 553, 563 (6th Cir. 1999) ("[W]e believe a rational trier of fact could conclude that Williams was subjected to a hostile work environment."),[10] *Beard v. Flying J, Inc.*, 266 F.3d 792, 797-98 (8th Cir. 2001) ("To establish a submissible case of sex discrimination, Ms. Beard was required to produce evidence that would allow a reasonable jury to conclude that she was a member of a protected group, that she was subjected to unwelcome sexual harassment, that the harassment was based on sex, and that the harassment affected a term, condition, or privilege of her employment.");[11] *Burks v. California Highway Patrol*, 2 Fed. Appx. 887, Nos. 99-56394, 99-56905, 2001 WL 80409, *1 (9th Cir. 2001) ("No rational jury could find a hostile work environment on the basis of the evidence Burks presented.").[12]

---

[10] *See also Abeita v. Transamerica Mailings, Inc.*, 159 F.3d 246, 248 (6th Cir. 1998) ("We reverse the grant of summary judgment on plaintiff's hostile work environment claim because the facts viewed in the light most favorable to the plaintiff would permit a jury to find objectively severe and pervasive harassment.").

[11] *See also Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999) ("Carter produced enough to avoid summary judgment because on such a record a factfinder could find the harassment sufficiently severe or pervasive to create liability under Title VII."); *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151, 1159 (8th Cir. 1999) ("This type of [harassing] conduct could be found by a jury to be sufficiently offensive to have altered Ms. Breeding's working conditions.").

[12] In order to resolve any lingering doubts, although not mentioned by Moore, the Tenth and District of Columbia Circuits similarly apply the reasonable juror standard on a motion for summary judgment involving hostile environment harassment claims. *See O'Shea v. Yellow Technology Servs., Inc.*, 185 F.3d 1093, 1096 (10th Cir. 1999) ("Thus, the

(Continued on following page)

Moreover, the en banc majority of the Eleventh Circuit in *Mendoza v. Borden, Inc.*, 195 F.3d 1238 (11th Cir. 1999), recited the reasonable juror standard at the outset before proceeding to "find" that plaintiff could not survive a motion for judgment as a matter of law on the objectively hostile environment prong of her sexual harassment claim:

> If the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict, then the motion was properly granted. [Cit. omitted]
>
> * * *
>
> Thus, to affirm the judgment as a matter of law, we must be convinced that no reasonable juror could have concluded that the conduct complained of constituted actionable sexual harassment in violation of Title VII.

195 F.3d at 1244, 1259.[13]

---

critical issue is whether, examining all of the evidence and reasonable inferences therefrom in a light most favorable to Plaintiff, a jury reasonably could infer that a hostile work environment existed . . . "); *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (holding that a jury may resolve the point at which a supervisor's harassment became severe or pervasive, "but without improperly resolving disputed issues of fact, we cannot.").

[13] *See also Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1276 (11th Cir. 2002) ("[W]e conclude that fair-minded jurors could have reasonably concluded that Miller suffered severe and pervasive harassment sufficient to alter the terms or conditions of his employment."); *U.S. Equal Employment Opportunity Comm. v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1249 (11th Cir. 1997) ("Some remarks, moreover, were so patently offensive that a jury could have inferred from their very nature both that Paigo was offended by them

(Continued on following page)

Finally, it is telling that none of the Fourth, Sixth, Eighth, Ninth, and Eleventh Circuit authorities that Moore cites in support of her argument even address any circuit split as to a reasonable juror standard on this issue, much less articulate a rejection of that standard or an affirmative adoption of a rule allowing the court to substitute its own judgment for its judgment of what a reasonable juror could find. No such divergence of authority exists. This issue is not appropriate for review by this Court.

II. The Ruling Below On Moore's Hostile Work Environment Claim Does Not Conflict With Existing Supreme Court Precedents.

Moore does not contend that the rulings below conflict with existing Supreme Court precedents. In fact, the rulings below are consistent with this Court's statements in *Faragher* that judgment as a matter of law should be granted in favor of employers to filter out claims lacking objective evidence of extreme and pervasive discriminatory conduct. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

---

and that those making them would have realized they were unwelcome.").

III. This Case Does Not Present A Split Of Circuit Authority As To Whether Rejection Of A Harasser's Advances Constitutes Protected Opposition Under Section 704(a) Of Title VII.

As with Moore's first issue presented to this Court, the courts below did not render the decision attributed to them by Moore, and this case does not involve a split of circuit authority on Moore's second issue on petition for a writ of certiorari.

A. The Eleventh Circuit Held That Moore Established A *Prima Facie* Case Of Protected Activity Under The Opposition Clause.

According to Moore, the Eleventh Circuit ruled that her request to Taylor, a co-worker but not her supervisor, that he "leave [her] alone" pursuant to the communication ban was not protected by the opposition clause of Title VII's anti-retaliation provision.[14] 42 U.S.C. §2000e-3(a). To the contrary, the Eleventh Circuit in this case "assume[d], as the district court did, that Moore established a *prima facie* case of retaliation," before determining whether TPA articulated a legitimate, nondiscriminatory reason for terminating her employment for violating the communication ban.[15] The first prong of a *prima facie* case of retaliation under Eleventh Circuit jurisprudence requires a showing that plaintiff engaged in statutorily protected expression. *See Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d

---

[14] Moore Cert. Pet., p. 18.

[15] Moore Cert. Pet. App. 6a.

1453, 1454 (11th Cir. 1998). Thus, the Eleventh Circuit ruled that Moore established a *prima facie* case of statutorily protected expression under the opposition clause. The reasonable inference to be drawn from the Eleventh Circuit's opinion is that it then reached the same conclusion as the district court in finding that Moore's gesture and statement to Taylor, a non-supervisor, regarding his violation of the communication ban was not a report of an unlawful employment practice.[16]

Again, the district court found that, although Moore was complaining that Taylor was harassing her in August, 1998, she was not complaining that he was harassing her on the basis of *sex* in August, 1998.[17] There is no record evidence of sexual harassment, or of Moore's complaint of *sexual* harassment to TPA or Taylor, after Pruitt issued the communication ban.

B. There Is No Split Of Circuit Authority As To Whether A Statement To The Non-Supervisor Harasser Allegedly Rejecting His Advances Is Protected Opposition Under Section 704(a).

This case does not present the split of authority that Moore alleges; the statement of rejection to a non-supervisor in this case is distinguishable from the cases cited by Moore involving complaints of actionable harassment to supervisors or rejection of a supervisor's orders. Even if the Eleventh Circuit had reached the holding

---

[16] Moore Cert. Pet. App. 6a.

[17] Moore Cert. Pet. App. 29a.

attributed to it by Moore, *i.e.* that Moore's admonition to Taylor that he "leave [her] alone" was a complaint to him about sexual harassment that is not protected by Section 704(a), the other circuits cited by Moore have not addressed whether the rejection of a non-supervisor's allegedly harassing advances constitutes protected opposition under Section 704(a). Moore incorrectly relies on *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000), as evidence of an applicable circuit split, because the harasser who received the plaintiff's complaint/rejection in that case was her district manager who was responsible for determining her raises and completing her performance evaluations. 214 F.3d at 1003. Moore next relies upon *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999), notwithstanding the fact that there was no claim of protected opposition under Section 704(a) in that case, and the plaintiff had repeatedly reported the unwelcome harassment by her ex-husband to the company's management. 165 F.3d at 638. Similarly, there was no claim of protected opposition under Section 704(a) in *DeGrace v. Rumsfeld*, 614 F.2d 796 (1st Cir. 1980), the next case on which Moore relies. Finally, in *Rucker v. Higher Educational Aids Bd.*, 669 F.2d 1179 (7th Cir. 1982), the last case relied upon by Moore as direct support for the alleged split of authority, the plaintiff wrote a memorandum *to her direct supervisor* about his harassment of a third party, and the retaliation claim was not exclusively based on that complaint. 669 F.2d at 1180. Therefore, this case does not present a split of circuit authority on a ruling issued by the Eleventh Circuit in the case below.

Moreover, this case does not present the untenable "express judicial sanction for employers who want to punish the harassment victim herself"[18] alleged by Moore, nor does it present "a cruel dilemma when *a supervisor* demands sexual favors on pain of dismissal"[19] as she contends. First, the conduct of Taylor following the communication ban was neither a demand for sexual favors nor a demand from a supervisor.

Second, Moore is simply incorrect in stating that "[u]nder the decision below, [an employee fired for rejecting her harasser's advances] would only have a claim for the harassment suffered on the job, and could not sue for the dismissal that ultimately resulted."[20] This Court need look no further than *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999), a case cited by Moore, for an example of an employee's recovering an award of back pay for termination of her employment following her actions to defend against discriminatory harassment where the termination was the result of such discriminatory harassment. It is axiomatic that an employee can recover damages from the termination of her employment where such termination is an adverse employment action arising out of prohibited harassment under Title VII.

Finally, Moore implies that there were only two choices available to her under the rule of law espoused by the Eleventh Circuit in this case: reject the "supervisor['s]" demand and be fired as a result without the ability to

---

[18] Moore Cert. Pet., p. 20.

[19] Moore Cert. Pet., p. 25 (emphasis added).

[20] Moore Cert. Pet., p. 24.

recover damages for the termination of employment under Section 704(a), or submit to the demand and then complain to management or the EEOC and suffer a claim that her submission demonstrated that the activity was consensual.[21] She failed to address the third option, which is entirely consistent with this Court's jurisprudence on harassment complaints: reject the non-supervisor harasser's proposal, and report the incident to company management pursuant to stated complaint procedures. In the instant case, TPA told Moore to report any complaints about Taylor or any other employee to Pruitt or Smith, both members of TPA management, but instructed Moore not to communicate directly with Taylor. By complaining that she could not ignore TPA's instructions, complain directly to her non-supervisor harasser, and still enjoy the possibility of recovering damages for a harassment claim and a separate retaliation claim, Moore attempts to convert a statement of rejection to a non-supervisor harasser into a protected complaint. Title VII does not allow a plaintiff to bypass the complaint to management requirement of the opposition clause under Section 704(a) in this manner. Moore has cited no cases that establish a split of authority on that issue.

C. The Ruling Below On Moore's Complaint To Taylor Does Not Conflict With Existing Supreme Court Precedents.

Moore does not argue that the Eleventh Circuit's ruling below directly conflicts with this Court's precedents.

---

[21] Moore Cert. Pet., pp. 25-26.

Instead, Moore recognizes that *Faragher* holds that an employer will be liable for sexual harassment if it culminates in a tangible employment action against the victim of harassment, yet complains that she could not recover damages for the termination of her employment arising out of such harassment in violation of the principles espoused in this Court's *Faragher* decision. For the reasons stated above, it is entirely consistent with this Court's jurisprudence to allow a plaintiff to recover back pay, compensatory, and even punitive damages for a discriminatory termination of employment arising out of unlawful harassment, while at the same time denying protected status to a statement rejecting a non-supervisor's non-sexual communication under the opposition clause on a retaliation claim.

IV. The Decision Of The Eleventh Circuit May Be Upheld Because It Is Also Correct Under Other Standards.

In reviewing the decisions below, this Court is not limited to the grounds embraced by the lower courts. *See U.S. v. Arthur Young and Co.*, 465 U.S. 805, 814, n.12 (1984) (a prevailing party may urge any ground in support of the judgment, whether or not that ground was relied upon or even considered by the court below); *U.S. v. New York Tel. Co.*, 434 U.S. 159, 166, n.8 (1977); *Dandridge v. Williams*, 397 U.S. 471, 475-76, n.6 (1970). Rather, the decisions below may be upheld on grounds not alleged by any respondent or considered by the courts below. *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507, 1517 (11th Cir. 1994); *Powers v. U.S.*, 996 F.2d 1121, 1123-24 (11th Cir. 1993).

Even if the Eleventh Circuit had made its own judgment as to the merits of Moore's claim of an objectively hostile environment, and even if the Eleventh Circuit had ruled that Moore's statement to her alleged harasser was a complaint about sexual harassment that was not protected opposition under Section 704a, the decisions below contain ample justification to decline review of the Eleventh Circuit's decision on other grounds. Some of the reasons to decline review of the Eleventh Circuit's affirmance of summary judgment in favor of TPA despite the purported rulings challenged by Moore include: (1) no reasonable juror could find that Taylor's conduct created an objectively hostile work environment giving rise to Title VII liability; (2) no reasonable juror could find that Taylor's conduct, even if objectively hostile, interfered with Moore's job performance; and (3) Moore cannot establish pretext to overcome TPA's legitimate, nondiscriminatory reason for terminating her employment on the basis of her violation of the communication ban.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny Moore's Petition for Writ of Certiorari.

Respectfully submitted,

MARY ANN B. OAKLEY
Counsel of Record
C. ANDREW HEAD
HOLLAND & KNIGHT LLP
2000 One Atlantic Center
1201 West Peachtree St., N.E.
Atlanta, Georgia 30309-3400
(404) 817-8500

(3)

No. 01-1726

Supreme Court, U.S.
FILED
JUL 25 20
CLERK

In The
Supreme Court of the United States

MIGNON MOORE,

Petitioner,

v.

TRAVIS PRUITT & ASSOCIATES, P.C.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

KRISTINE E. ORR
E. WYCLIFFE ORR
ORR & ORR
P.O. Box 2944
641 Spring St.
Gainesville, GA 30503
(770) 534-1980

ERIC SCHNAPPER*
UNIVERSITY OF WASHINGTON
School of Law
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QP3

TABLE OF CONTENTS

Page

The Court of Appeals Decision Means What it Says 1

Conclusion 7

THE COURT OF APPEALS DECISION MEANS WHAT IT SAYS

(1) In the court of appeals, respondent asked for and got a determination by the appellate court that the harassment in this case did not create a hostile environment.

> The district court properly *determined* that Taylor's conduct did not create an objectively hostile work environment. Although Taylor's alleged statements and conduct were inappropriate, his acts fall short of the level of either severe or pervasive conduct sufficient to alter the terms or conditions of Moore's employment.

(Pet. App. 8a) (Emphasis added). An appellate finding of fact regarding whether there was a hostile environment would undeniably conflict with the decisions of this Court and of several other circuits. (Petition 13-16).

Making the best of a bad situation, respondent insists that what the court of appeals actually *meant* was that no reasonable jury could determine that the environment was hostile. The opinion of the Eleventh Circuit, respondent argues, is merely "poorly drafted" (Br. Opp. 5); the appellate court never bothered to mention the reasonable jury standard because that would have been to "state the obvious." (*Id.*). And there could be no inter-circuit conflict, according to respondent, because every judge knows that appellate courts cannot make their own findings regarding whether or not there was a hostile environment in a particular case. (Br. Opp. 4-6).

Respondent's insistence that the decision of the court of appeals is merely a slip of the judicial pen is belied by the fact that there are literally dozens of similarly worded opinions in the Fourth, Sixth, Eighth, Ninth and Eleventh

Circuits. (Petition 9-12). Every appellate judge understands full well the difference between making his or her own determination on appeal, and merely resolving whether a reasonable jury might have arrived at a particular result. It is not to be believed that the authors of dozens of appellate opinions have repeatedly used phrases like "we find" when they *meant* instead to say "any reasonable jury would find." Nor can it possibly be sheer coincidence that appellate courts which carefully and expressly make this distinction in all other instances have repeatedly failed to do so in dismissing sexual harassment claims.

Respondent does not point to passages in these dozens of cases themselves which call into question their evident literal meaning. Instead, respondent observes that there are in these same circuits *other* decisions in harassment cases which do indeed apply a reasonable jury standard. (Br. Opp. 6-8). But this merely highlights a pattern of decision-making which is even more troubling. As a general matter,[1] when panels in these circuits rule for the defendant, they make their own determination that the environment was not hostile; but when the decision is in favor of the plaintiff, the courts merely hold that a reasonable jury could find the environment was hostile. With the exception of one Ninth Circuit decision, *all* of the decisions cited by respondent in which a "reasonable jury" standard was applied are decisions in favor of the plaintiff.

This asymmetrical practice has an obvious and indefensible result. Appellate courts that will with alacrity

[1] The pattern in the more pro-plaintiff Ninth Circuit is less clear.

make their own determination that an environment *was not* hostile (and thus award defendants summary judgment or judgment as a matter of law) refrain from making determinations that a work environment *was* hostile (a determination which would require summary judgment for the plaintiff). In these circuits, decisions in harassment cases granting summary judgment to defendants are legion; decisions granting summary judgment to plaintiffs are unknown. Prevailing defendants alone can obtain summary judgment or judgment as a matter of law; prevailing plaintiffs can win only a right to trial, at which the defendant will be accorded a chance to show the environment was not hostile. Thus there is in these circuits a growing body of caselaw delineating what types of harassment *do not* create a hostile environment, but no similar body of caselaw delineating what types of harassment *do* do so.

Respondent emphasizes that in this case the *district* court did refer to the reasonable jury standard (Br. Opp. 5), and asserts that the appellate court in turn agreed with the "result." (Br. Opp. 6). But at this juncture the question is what legal standard the *appellate* court applied. The Eleventh Circuit decision makes no reference to the reasonable jury standard; indeed, the word "jury" is nowhere to be found in its opinion.[2] The fact that in this

[2] The Eleventh Circuit held that Moore had not adduced sufficient evidence "to support a *finding*" that the harassment created a hostile environment. (Pet. App. 9a) (Emphasis added). This passage refers to whether the evidence would warrant a judicial determination that there was a hostile work environment. "Findings" are made by courts; juries return verdicts. *Compare* Fed. Rule Civ. Pro. 49 *with* Fed. Rule Civ. Pro. 50.

regard the appellate opinion utilizes a standard different than that applied by the district court confirms that the Eleventh Circuit meant what it said – the panel itself arrived at its own conclusion that the harassment did not create a hostile environment, and regarded its conclusion as dispositive.

(2) In disavowing the literal meaning of the Eleventh Circuit's finding regarding the harassment claim, respondent insists that the court of appeals assuredly knew that judges cannot make findings regarding disputed facts in a case in which a jury has been requested. This Court, it reasons, must therefore conclusively presume that the Eleventh Circuit did not intend to make or uphold any such obviously impermissible factual finding. On the other hand, in disavowing the literal meaning of the appellate decision regarding the retaliation claim, respondent takes precisely the opposite approach. The Eleventh Circuit, respondent insists, must be presumed to have been making or upholding a finding of fact that the harassment which Moore resisted was not *sexual* harassment. (Br. Opp. 10-11).

The Eleventh Circuit's rejection of the retaliation claim is phrased as a straightforward legal issue.

> Because Moore's gesture and statement to Taylor was not a report of an unlawful employment practice, this contact was not protected expression under Title VII. *See* 42 U.S.C. § 2000e-3(1); *see also Johnson v. Booker T. Washington Broadcasting Service, Inc.*, 234 F. 3d 501, 507 (11th Cir. 2000) (stating that statutorily protected expression includes *filing complaints with the EEOC and complaining to superiors* about sexual harassment).

(Pet. App. 6a) (Emphasis added). When Moore told Taylor to stop harassing her, her objection was not a "complaint" of harassment, and thus was not protected by section 704(a) of Title VII.

Respondent insists, however, that what the court of appeals must actually have intended was to conclude that Taylor's harassment was not sexual in nature, and thus not the type of harassment covered by Title VII at all. (Br. Opp. 11). Respondent does not even attempt to point to a passage in the Eleventh Circuit opinion which could possibly have this meaning. Indeed, there is nothing in the opinion which suggests the court of appeals was even aware that such a factual contention had been made. Respondent offers no explanation of *why* Taylor would have been harassing Moore other than as a continuation of the prior, clearly sexual harassment.

Respondent asks this Court to infer reliance on such a factual finding – and to disregard the actual language of the opinion – because the appellate opinion states that Moore established a prima facie case of retaliation. Such a prima facie case could not exist, respondent reasons, if Moore's actions were not protected activity; *ergo*, the court of appeals must have believed that resisting Taylor's harassment constituted protected activity under section 704(a). Unstated appellate reliance on a never-mentioned factual finding, respondent suggests, is the only possible explanation for the action of the Eleventh Circuit in dismissing Moore's retaliation claim. (Br. Opp. 10-11).

The actual holding of an appellate decision cannot be disregarded on the basis of such speculative reasoning. Nothing in the decision itself suggests that the Eleventh Circuit thought that its reference to the existence of a

prima facie case somehow precluded that court from addressing and deciding whether Moore's actions were outside the protections of Title VII. In concluding that Moore's actions were unprotected, what the court of appeals actually cites is not any factual finding by the district court, but legal precedent which purportedly limits the statutory protections to "complaints". (Pet. App. 6a).

Respondent acknowledges that the several circuits have held that the act of resisting sexual or other harassment is protected activity under section 704(a). All of these cases, respondent asserts, involve harassment by a supervisor. (Br. Opp. 13-14). That is not correct.[3] More importantly, it is simply irrelevant. Respondent offers no explanation as to why section 704(a) would protect a plaintiff who resisted sexual harassment by a supervisor, but would not protect a plaintiff who took the identical action in resisting the very same harassment by a co-worker. No basis for such a distinction is readily imaginable.

[3] *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999) (plaintiff fired for pushing co-worker who was harassing her); *DeGrace v. Rumsfeld*, 614 F.2d 796, 804 (1st Cir. 1980) (plaintiff fired for staying away from job because of threats by "fellow employees").

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

KRISTINE E. ORR
E. WYCLIFFE ORR
ORR & ORR
P.O. Box 2944
641 Spring St.
Gainesville, GA 30503
(770) 534-1980

ERIC SCHNAPPER*
UNIVERSITY OF WASHINGTON
School of Law
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

Counsel for Petitioner

**Counsel of Record*